TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 251

PANAMA CANAL COMPANY, PETITIONER,

vs.

GRACE LINE, INC., ET AL.

No. 252

GRACE LINE, INC., ISBRANDTSEN COMPANY, INC., LUCKENBACH STEAMSHIP COMPANY, INC., ET AL., PETITIONERS,

vs.

PANAMA CANAL COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JULY 6, 1957

CERTIORARI GRANTED OCTOBER 14, 1957

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

DOCKET ENTRIES

Civ. 103-229

GRACE LINE, INC., ISBRANDTSEN COMPANY, INC., LUCKENBACH STEAMSHIP COMPANY, INC., Matson Navigation Company, Moore-McCormack Lines, Inc., Ore Navigation Corporation, Calmar Steamship Corporation, Pope and Talbot, Inc., States Marine Corporation of Delaware, United Fruit Company, United States Lines Company and Weyerhauser Steamship Company, (addt'l pltffs 12-8-55) National Bulk Carriers, Inc., American-Hawaiian Steamship Company, Ore Transport, Inc. and American Tankers Corporation

vs.

PANAMA CANAL COMPANY

Basis of Action: Public Law 841, 81st Congress, etc. Excess charges on toll rates, Panama Canal.

Attorneys for Plaintiff: Maclay, Morgan & Williams, 76 Beaver St. (5).

9/13/55 M. M. & W., Received $15.00.
9/16/55 Pd. U. S. Treas., Disbursed $15.00.
7/26/56 M. M. & W., Received $5.00.
July 27, 1956 Pd. U. S. Treas., Disbursed $5.00.

Sept. 13-55, Filed complaint and issued summons.
Sept. 16-55, Filed summons and return, served deft. 9-14-55.
Sept. 30-55. Issued additional summons.
Oct. 10-55. Filed additional summons and return, served deft. & USA (Tannenbaum, etc.) 10-3-55.
Nov. 3-55. Filed Affdvt. of service of Order to Show Cause.
Nov. 10-55. Filed pltffs' request for admission.
Nov. 10-55. Filed pltffs' notice of deposition.

Nov. 10-55. Filed pltffs' interrogatories.

Nov. 14-55. Filed stip. & order extending time to answer, etc. to 1-1-56, etc.—McGohey, J.

Nov. 16-55. Filed affvdt & notice of motion for intervention as parties pltff—ret. 11-29-55.

Oct. 28-55. Filed affdvt & show cause order—Motion by pltff for summary judgment—ret. 1-5-56.

Dec. 7-55. Memo endorsed on motion filed 11-16-55—Granted—Order signed—Dawson, J.

[fol. 2] Dec. 8-55. Filed order for intervening complaint and adding intervening pltffs.—Dawson, J.

Dec. 14-55. Filed affdvt & notice of motion by deft. to quash subpoena duces tecum re: Jos. Campbell—ret. 12-20-55.

Dec. 16-55. Filed affdvt & notice of motion to dismiss—ret. 12-22-55.

Dec. 20-55. Filed affdvt & show cause order—to modify order of Edelstein, J. dated 10-28-55-ret. 12-20-55.

Dec. 20-55. Memo endorsed on show cause filed 12-20-55—Granted as indicated upon argument—Settle order—Walsh, J.

Dec. 20-25. Filed affdvt & show cause order to adjourning depositions of J. Campbell & W. Newman, etc.—ret. 12-20-55.

Dec. 20-55. Memo endorsed on show cause re: adjournment filed 12-20-55—Granted as indicated upon argument—Settle order—Walsh, J.

Dec. 23-55. Filed deft's unsigned proposed order to quash.

Dec. 23-55. Filed order extending time of deft to serve & file answer affdvts to pltffs' pending motion for summary judgment to 12-29-55, etc.—Walsh, J.—Mailed notice of entry 12-27-55.

Dec. 23-55. Filed order adjourning taking of deposition of J. Campbell, et ano, to 12-29-55, etc.—Walsh, J.—Mailed notice of entry 12-27-55.

Dec. 20-55. Memo endorsed on motion filed 12-14-55—Consented to, settle order—Walsh, J.

Dec. 28-55. Filed order quashing subpoena duces tecum directed to Jos. Campbell—Walsh, J.—Mailed notice of entry 12-30-55.

Jan. 5-56. Memo endorsed on motion filed 10-28-55—Marked off pending decision of Judge Walsh on motion now before him—Bicks, J.

Jan. 10-56. Filed order—adjournments, extensions and reservations in orders of 12-22-55 further extended to date of determination of pending motion to dismiss, etc. Walsh, J.—Mailed notice of entry 1-12-56.

Jan. 12-56. Filed complaint of intervening pltffs. Nat'l Bulk Carriers, Inc., et al.

Feb. 2-56. Filed affdvt & notice of motion to intervene as parties pltff.—ret. 2-2-56.

Feb. 7-56. Memo endorsed on motion filed 2-2-56—Referred to Judge Walsh—Kaufman, J.

Feb. 21-56. Filed Affdvt. & Notice of Motion for third party pltf. Ret. 2-28-56. MM&W.

Jun. 27-56. Memo endorsed on motion filed 2-2-56. Motion granted pursuant to Rule 24(b)(2). Walsh, J. Mailed notice of entry 6-29-56.

Jun. 27-56. Memo endorsed on motion filed 2-21-56. Motion Granted. Pursuant to Rule 24(c)(2): Walsh, J. Mailed notice of entry 6-29-56.

Jun. 29-56. Filed Opinion #22751 and judgment (added 8-2-56) dismissing complaint. Walsh, J. Mailed notice of entry 6-26-56.

June 29-56. Filed Affdvt in opposition.

June 29-56. Filed Deft's affidavit in opposition to motion.

[fol. 3] July 26-56. Filed Notice of Appeal and on 7-27-56 mailed copy of George Cochran Doub, Asst. Atty. Gen., Wash., D.C.

July 27-56. Filed Cost Bond on Appeal—Indemnity Ins. Co. of N. America.

August 3-56. Filed transcript of record of proceedings as of December 20, 1955 and December 29, 1955.

Aug. 3-56. Filed Notice of Appeal. Mailed copy to George Cochran Doub, 607 U.S. Court House, Asst. Atty. Gen.

Aug. 3-56. Filed Appeal Bond. Indemnity Ins. Co. of North America NY.

[fol. 4] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

GRACE LINE, INC., ISBRANDTSEN COMPANY, INC., LUCKENBACH STEAMSHIP COMPANY, INC.; Matson Navigation Company; Moore-McCormack Lines, Inc.; Ore Navigation Corporation; Calmar Steamship Corporation; Pope and Talbot, Inc.; States Marine Corporation of Delaware; United Fruit Company; United States Lines Company; and Weyerhaeuser Steamship Company, Plaintiffs,

against

PANAMA CANAL COMPANY, Defendant

COMPLAINT—Filed Sept. 13, 1955

Plaintiffs, complaining of defendant by their attorneys, Maclay, Morgan & Williams, allege:

First: Plaintiffs are corporations organized and existing under the laws of the states of the United States. Plaintiffs own and operate ships documented under the laws of the United States. Plaintiffs bring suit on behalf of themselves and all other members of the class hereinafter described.

Second: Defendant is a corporation organized and existing under the laws of the United States, is wholly owned by the United States, and is an agency of the United States. Defendant is an inhabitant and resident of the Southern Judicial District of New York and may be sued in its corporate name.

[fol. 5] Third: The action arises under Public Law 808, 80th Congress, Second Session, and Public Law 841, 81st Congress, Second Session. The matter in controversy as between defendant and each plaintiff only, and apart from the other members of the class on whose behalf suit is brought, exceeds the sum of $3,000 exclusive of interest and costs.

Fourth: Defendant maintains and operates a canal traversing the Isthmus of Panama, known and herein referred to as the "Panama Canal."

Fifth: On July 1, 1951, it became defendant's duty, as provided by Public Law 841, 81st Congress, Second Session, and Executive Order 10263 issued by the President of the United States on June 29, 1951, to prescribe tolls for the use of the Panama Canal at a rate or rates calculated to cover as nearly as practicable all costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances relating thereto, including interest and depreciation, and an appropriate share of the net cost of the operation of the agency known as the Canal Zone Government; to give six months' notice by publication in the Federal Register of any and all proposed changes in rates of tolls; and to conduct a public hearing during said period.

Sixth: Defendant has wholly and completely failed and neglected to act as provided by law, and has unlawfully withheld and unreasonably delayed such action. Defend- [fol. 6] ant has prescribed no tolls whatever and has conducted no public hearing. At all times since July 1, 1951, defendant has exacted from ships carrying cargo or passengers for transits through the Panama Canal a toll of ninety cents a ton, and from ships in ballast a toll of seventy-two cents a ton. Said rates had been exacted before July 1, 1951 and bear no relation to the formula provided by law.

Seventh: Plaintiffs' ships regularly use the Panama Canal. Since July 1, 1951, defendant has exacted from plaintiffs many million dollars in tolls for Panama Canal transits and continues to exact tolls in the millions of dollars annually for such transits, as more particularly appears in the table annexed hereto marked "Exhibit A."

Eighth: Defendant has published and publishes annually reports of its activities for fiscal years ending June 30. Said reports include financial statements. Said reports and financial statements have failed and neglected to state the costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances relating thereto, including interest and depreciation, and an appropriate share of the net cost of the operation of the agency known as the Canal Zone Government.

Ninth: According to defendant's published reports, it has, in the three-year period July 1, 1951-June 30, 1954,

realized operating income of $68,425,144 from the Panama Canal, together with the facilities and appurtenances, re-
[fol. 7] lated thereto, and net corporate income of $13,028,-533. The amount of net corporate income was reached by the addition of $12,401,567 operating income from other activities and the deduction of $67,798,178 administrative and other general expenses, costs of the operation of the agency known as the Canal Zone Government and interest payable to the United States Treasury, all unallocated as between maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto, and defendant's other activities.

Tenth: The accounting determinations of the General Accounting Office are final and conclusive on all wholly owned corporations and agencies of the United States, but are not final and conclusive against plaintiffs.

Eleventh: The General Accounting Office has made determinations of the costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances relating thereto, including interest and depreciation, and an appropriate share of the net cost of the operation of the agency known as the Canal Zone Government. According to said determinations defendant, in the three-year period July 1, 1951-June 30, 1954, has realized revenue from the Panama Canal, together with the facilities and appurtenances relating thereto, exceeding the costs of maintenance and operation, including interest and depreciation, and an appropriate share of the net cost of the operation of the agency known as the Canal Zone Government, by $27,836,504.

[fol. 8] Twelfth: The General Accounting Office further determined that the losses from defendant's activities other than the maintenance and operation of the Panama Canal, together with the facilities and appurtenances relating thereto, amounted to $14,807,971, so that the $13,028,533 referred to in paragraph "Ninth" represented the $27,-836,504 excess collections after the deduction of the losses from the other activities.

Thirteenth: Plaintiffs are not aware of the amount of excess collections for the period subsequent to July 1, 1954, according to the accounting procedures of the General Accounting Office, but believe said amount to be over $10 million.

Fourteenth: The amounts of tolls paid by plaintiffs since July 1, 1951 are far in excess of the amounts payable at a rate or rates calculated to cover as nearly as practicable all costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances relating thereto, including interest and depreciation and an appropriate share of the net cost of the operation of the agency known as the Canal Zone Government.

Fifteenth: By reason of defendant's failure to act, and defendant's unlawfully withholding and unreasonably delaying action provided by law, as aforesaid, and its collection of excessive tolls meanwhile, each plaintiff has suffered damages of many thousands of dollars, and damages [fol. 9] continue to accrue so long as defendant unlawfully withholds and unreasonably delays action.

Sixteenth: Since July 1, 1951, defendant has exacted tolls in the aggregate from commercial ships using the Panama Canal as follows:

Period	Tolls
July 1, 1951—June 30, 1952	$26,922,531
July 1, 1952—June 30, 1953	31,917,515
July 1, 1953—June 30, 1954	33,247,863
July 1, 1954—June 30, 1955	33,918,993

In addition, the Panama Canal has been used by United States Government ships for which defendant is paid tolls by appropriate intra-governmental credits, as follows:

Period	Amount
July 1, 1951—June 30, 1952	$ 3,413,728
July 1, 1952—June 30, 1953	5,557,682
July 1, 1953—June 30, 1954	3,888,957
July 1, 1954—June 30, 1955	1,217,536

The commercial ships using the Panama Canal flew the flags of thirty-five nations in the year ended June 30, 1955. The number in preceding years was similar.

Plaintiffs do not know the exact number of shipowners whose ships have used the Panama Canal since July 1, 1951, but estimate the number at approximately 700.

Seventeenth: All shipowners using the Panama Canal are entitled to equality of rates of toll irrespective of nationality.

[fol. 10] Eighteenth: All shipowners using the Panama Canal have the same interest as plaintiffs in compelling defendant's action hitherto unlawfully withheld and unreasonably delayed. All such shipowners severally suffered damages by reason of defendant's failure to act as provided by law. Such damages vary in amount according to the weight and number of their respective ships and the frequency with which they have used the Panama Canal, but otherwise the measure of damages is the same. Said shipowners constitute the class on whose behalf this action is brought. The character of the right sought to be enforced for the class is several, and there are common questions of law and fact and a common relief is sought.

Nineteenth: The shipowners using the Panama Canal are located throughout the entire world. Said shipowners are so numerous and scattered as to make it impracticable to bring them before the court. Plaintiffs will fairly insure the adequate representation of all.

Twentieth: Defendant's excessive and illegal toll charges against plaintiffs and their class for the period July 1, 1951—June 30, 1954 amount at least to the $27,836,504 determined by the General Accounting Office. Said excessive and illegal toll charges since July 1, 1951 have been substantially greater than $27,836,504.

Wherefore, plaintiffs demand:

1. That this Court declare the duty of defendant to proceed forthwith to prescribe tolls and conduct the public hearing provided by law.

[fol. 11] 2. That this Court enjoin and restrain the defendant from further unlawfully withholding and unreasonably delaying the prescription of tolls and the conduct of the public hearing provided by law.

3. That this Court issue its judgment and decree commanding and directing the defendant forthwith to prescribe tolls and conduct the public hearing provided by law.

4. That this Court enjoin and restrain the defendant, in the prescription of tolls, from using accounts less favorable to plaintiffs and their class than those determined by the General Accounting Office.

5. That during defendant's prescription of tolls and conduct of hearing as required by law and commanded by this Cour this Court retain jurisdiction of the cause and issue

appropriate orders and decrees that the defendant prescribe tolls and conduct the public hearing according to law.

6. That this Court impress a trust upon, and require defendant to account for, the tolls collected by it in excess of the costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances relating thereto, including interest and depreciation, and an appropriate share of the net cost of the operation of the agency known as the Canal Zone Government, by reason of defendant's unlawfully withholding and unreasonably delaying prescription of tolls as provided by law, together with interest, and also for such additional excess tolls as may be collected by defendant prior to defendant's performance of its duty.

7. That this Court award judgment and decree against defendant for damages suffered by plaintiffs and their class [fol. 12] by reason of its collection of excess tolls, such sum to be paid to the Clerk of this Court or such other depositary as the Court may appoint.

8. That this Court award summary judgment and decree against defendant for $27,836,504, to be paid to the Clerk of this Court or such other depositary as the Court may appoint.

9. That this Court distribute the moneys so paid as interest may appear.

10. That pending final judgment herein this Court issue appropriate orders and decrees to protect the plaintiffs and their class against the excessive tolls exacted by defendant by reason of its action unlawfully withheld and unreasonably delayed.

11. That this Court's final judgment herein include the costs of this action, together with such other and further relief as to the Court may seem just and proper.

Maclay, Morgan & Williams, by C. Dickerman Williams, A Member of the Firm, Attorneys for Plaintiffs, Office & P.O. Address, 76 Beaver Street, New York 5, N. Y.

Brobeck, Phleger & Harrison, 111 Sutter Street, San Francisco 4, Calif., Associate Counsel.

New York, N. Y.
September 13, 1955

[fol. 13] EXHIBIT A TO COMPLAINT

Tolls Exacted from Plaintiffs for Panama Canal Transits, July 1, 1951—June 30, 1955

Grace Line, Inc.	$3,579,930
Isbrandtsen Company, Inc.	494,548
Luckenbach Steamship Company, Inc.	2,919,938
Matson Navigation Company	1,122,005
Moore-McCormack Lines, Inc.	520,020
Ore Navigation Corporation	2,218,236
Calmar Steamship Corporation	1,403,704
Pope and Talbot, Inc.	1,867,502
States Marine Corporation of Delaware	2,112,758
United Fruit Company	4,701,045
United States Lines Company	1,517,294
Weyerhaeuser Steamship Company	1,167,807

[fol. 14] IN THE UNITED STATES DISTRICT COURT

ORDER TO SHOW CAUSE FOR SUMMARY JUDGMENT—October 28, 1955

On reading the affidavits of C. Dickerman Williams, sworn to the 26th day of October, 1955, Cassius C. Mallory, sworn to the 30th day of September, 1955, R. F. Pierce, sworn to the 5th day of October 1955, James Sinclair, sworn to the 28th day of September 1955, H. B. Perrin, sworn to the 30th day of September, 1955, S. L. Barbera, sworn to the 18th day of October 1955, Mark R. Kreidler (2), sworn to the 4th day of October, 1955, Jos. L. Paiva, sworn to the [fol. 15] 29th day of September, 1955, P. D. Barksdale, sworn to the 28th day of September, 1955, Louis S. Sisto, sworn to the 5th day of October, 1955, R. M. Hicks, sworn to the 29th day of September, 1955, and O. E. Fox, sworn to the 29th day of September, 1955, and on motion of Maclay, Morgan & Williams, attorneys for the plaintiffs herein, it is

Ordered, that defendants show cause at a term of this Court for the hearing of motions to be held in Room 506 of the United States Courthouse, Foley Square, City and

County of New York, on the 6th day of December, 1955, at 10 o'clock on the morning of said day, or as soon thereafter as counsel can be heard, why summary judgment should not be made herein under Rule 56 of the Rules of Civil Procedure:

1. Declaring the duty of defendant to proceed forthwith to prescribe tolls as provided by Section 12, Public Law 841, 81st Congress, propose changes in tolls as indicated by said prescription and conduct a public hearing, all according to law;

2. Enjoining and restraining the defendant from further unlawfully withholding and unreasonably delaying the prescription of tolls as provided by Section 12, Public Law 841, 81st Congress, the proposal of changes in tolls as indicated by said prescription and the conduct of a public hearing, all according to law;

3. Commanding and directing the defendant forthwith to prescribe tolls as provided by Section 12, Public Law 841, 81st Congress, propose changes in tolls as indicated by said prescription and conduct a public hearing, all according to law;

4. Enjoining and restraining the defendant in the prescription of tolls from using accounts less favorable to the plaintiffs and their class than those determined by the General Accounting Office;

5. Retaining jurisdiction of the cause so as to issue appropriate orders and decrees that the defendant prescribe [fol. 16] tolls, propose changes in tolls and conduct a public hearing according to law;

6. Declaring defendant liable in damages to plaintiffs and their class for its failure to prescribe tolls according to law;

7. Impressing a trust upon, and requiring defendant to account for, the tolls collected by it in excess of the costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances relating thereto, including interest and depreciation, and an appropriate share of the net costs of the operation of the agency known as the Canal Zone Government, by reason of defendant's unlawfully withholding and unreasonably delaying prescription of tolls according to law, together with interest, until tolls prescribed according to law take effect;

8. Appointing a Special Master under Rule 53 of the Rules of Civil Procedure to hear and report to this Court the amount of such excess tolls so collected by defendant;

9. Declaring that the amount of excess tolls so collected by the defendant from plaintiffs and their class during the period July 1, 1951—June 30, 1954, is not less than $27,856,504 (including toll credits), as ascertained and liquidated by the General Accounting Office;

10. Retaining jurisdiction of the cause so as to receive the report of the Special Master, enter appropriate judgment upon that report and distribute according to law to each plaintiff and each member of their class its proportionate share of the excess tolls;

on the ground that, except as to the amount of damages, there is no genuine issue as to any material fact and that the plaintiff is entitled to judgment as a matter of law; and it is further

[fol. 17] Ordered, that service of a copy of this order and of the papers upon which it is granted, made upon defendant and the United States Attorney for the Southern District of New York, and by registered mail to the Attorney General of the United States, on or before October 28, 1955, shall be sufficient, except that copies of the exhibits annexed to the affidavit of C. Dickerman Williams which are official publications of the United States may be omitted from the copies of the papers served upon the defendant and the United States Attorney for the Southern District of New York, and it is further

Ordered, that defendant serve its answering affidavits herein on plaintiffs' attorneys not later than November 25, 1955; and it is further

Ordered, that plaintiffs may serve reply affidavits herein upon the United States Attorney for the Southern District of New York and by ordinary mail, special delivery, upon the Attorney-General of the United States, not later than December 1, 1955, except that copies of those exhibits to the reply affidavits which are official publications of the United States may be omitted from the copies of the reply affidavits which are served upon the United States Attorney for the Southern District of New York.

David N. Edelstein, U. S. D. J.

October 28th, 1955, New York, N. Y.

[fol. 18] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss.:

C. Dickerman Williams, being duly sworn, deposes and says:

1. I am a member of the firm of Maclay, Morgan & Williams, attorneys for the plaintiffs, and am familiar with the pleadings and proceedings herein. This affidavit is submitted in support of plaintiffs' motion for summary judgment under Rule 56 of the Rules of Civil Procedure.

[fol. 19] Relief Sought

2. The relief sought on this motion is, in substance, summary judgment and decree (1) requiring the defendant to prescribe tolls and propose changes in tolls as required by Public Law 841 of the 81st Congress, hereinafter referred to as Public Law 841; (2) appointing a Special Master to hear and report the damages suffered by plaintiffs and their class, by reason of defendant's failure to act until tolls prescribed according to law take effect, and (3) declaring that plaintiffs and their class have been overcharged not less than $27,836,504 in tolls and toll credits from July 1, 1951 to June 30, 1954 as ascertained and liquidated by the General Accounting Office.

Basis of Motion

3. Reduced to simplest terms, the motion is based upon Section 12 of Public Law 841 and the audit report of the General Accounting Office of defendant's affairs for the fiscal year ended June 30, 1954.

Section 12 of Public Law 841, officially published at Volume 64, page 1038 of the United States Statutes at Large, enacts, *inter alia*, Section 412(b) of the Canal Zone Code, as follows:

> "(b) Tolls shall be prescribed at a rate or rates calculated to cover, as nearly as practicable, all costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto, including interest and depreciation, and an appropriate share of the net costs of operation of the

agency known as the Canal Zone Government. In the determination of such appropriate share, substantial weight shall be given to the ratio of the estimated gross revenues from tolls to the estimated total gross revenues of the said corporation exclusive of the cost of commodities resold, and exclusive of revenues arising from transactions within the said corporation or from transactions with the Canal Zone Government."

[fol. 20] The GAO audit report for 1954 (an official publication of this report is annexed hereto, marked "Exhibit A") sets forth calculations showing that defendant's toll collections July 1, 1951-June 30, 1954 exceeded the costs referred to in Section 12 by $27,836,504. Reference is made to the table appearing at page 13 of this report, Exhibit A, particularly the following column:

	Three years ended June 30, 1954 Canal activity
Revenue	$112,861,870
Operating expenses, including adjustments in 1954 to prior years' retained income	44,436,726
Operating income	68,426,144
General corporate expense (allocated by General Accounting Office):	
Net cost of Canal Zone Government (note a)	19,153,898
Interest payable to U. S. Treasury (note b)	18,518,673
Administrative and other general expenses (note c)	2,916,069
	40,588,640
Net income (−loss)	$ 27,836,504

(a) Net costs of Canal Zone Government are allocated on the revenue ratio defined in section 412(b) of the Canal Zone Code. This results in an allocation of 65 percent of these costs to the canal activity for 1954, 63 percent for 1953, and 55 percent for 1952. If the allocation were to be made on the basis of gross investment in fixed properties (see recommendation to the Congress, p. 9), about 78 percent of the costs would have been allocated to the canal activity.

(b) Interest for the fiscal years 1952, 1953, and 1954 is computed at 1.95, 2.05, and 2.342 percent, respectively, on $377,764,946, the net direct investment of the Government in the Company. Comments on interest expense are contained on page 19.

The capital base, that is, the gross investment in fixed properties, at June 30, 1954, used for allocating interest to all activities is $587,829,356 exclusive of defense facilities of $117,162,256. About 78 percent of this is invested in facilities of the canal activity and the remaining 22 percent in facilities of all other activities. This relationship has been approximately the same for the past 3 years.

(c) Most of the administrative and other general expenses were allocated on a direction-of-effort basis; the remainder was charged directly to the applicable activity. The direction-of-effort basis was used by the Company in 1953 for statistical purposes and seems reasonable. It results in an allocation of approximately 25 percent to the canal activity.

[fol. 21] At page 17 hereof the table is more fully quoted and at page 18 are quoted certain GAO comments thereon, including the following:

> "Based on the financial results of the canal activity for the past three years, toll rates would have to be reduced substantially if hearings were held at this time" (Exhibit A, p. 2).

Material Facts Relied on Evidence by Official Publications

4. The foregoing quotations from Public Law 841 and the GAO audit report for 1954 can, however, best be understood by a presentation of their background and setting. Apart from the affidavits of their officers showing plaintiffs' status as corporations of States of the United States and as users of the Panama Canal, the evidence on plaintiffs' motion is derived almost entirely from official publications of the United States and other matters of judicial notice. Cf. Rule 44; *United States* v. *Aluminum Company of America*, 1 F. R. D. 71, 75 (S. D. N. Y.). Such evidence could be presented to the Court by simple annexation to the moving papers. However such presentation would impede compre-sion of the facts and plaintiffs' theory. In the interests of simplification, this narrative affidavit, setting forth quotations from, and identifying, the official publications relied on, is intended to correspond primarily to the remarks of counsel at a trial in proving a case by official publications.

I have been a member of the bar since 1926 and have been twice employed by the United States Department of Justice and once by the United States Department of Commerce. My practice has involved continual work with official publications of the United States Government. All books, reports and documents herein referred to as official publications purport to be such, and I so recognize and identify them.

[fol. 22] With respect to those judicially noticeable facts and provisions of law which are in official publications readily available to judges and attorneys, such as the statutes of the United States, I shall only quote the relevant language. With respect to those in official publications not thus readily available, the publications themselves are annexed to the affidavit as exhibits.

Defendant Created in 1948 as Panama Railroad Company to Operate Various Business Properties

5. The defendant was created by Public Law 808 of the 80th Congress, hereinafter referred to as Public Law 808, officially published at Volume 62, pages 1075-1080 of the United States Statutes at Large under the name of the Panama Railroad Company.* Public Law 808, by Section 2, enacted Article 3, Section 245 of the Canal Zone Code, as follows:

> "SEC. 2. Chapter 12 of title 2 of the Canal Zone Code, approved June 19, 1934 (48 Stat. 1122), is amended by adding at the end of said chapter a new article numbered 3, * * * and reading as follows:
>
> "'ARTICLE 3—PANAMA RAILROAD COMPANY ACT
>
> "'245. *Creation, Purpose, Offices, and Residence of Panama Railroad Company.*—For the purpose of conducting business operations incident to the care, maintenance, sanitation, operation, improvement, government, and protection of the Panama Canal and the Canal Zone, there is hereby created, as an agency and instrumentality of the United States, and as an adjunct of the Panama Canal, a body corporate to be known as the Panama Railroad Company, hereinafter referred to as the "corporation". The principal offices of the corporation shall be in the city of New York, New York, and in the Canal Zone, but the corporation [fol. 23] may establish agencies or branch offices in such other place or places as it may deem necessary or appropriate in the conduct of its business. Within the meaning of the laws of the United States relating to venue in civil actions, the corporation shall be deemed to be an inhabitant and resident both of the southern judicial district of New York and of the Canal Zone.'"

---

*The common form of citation "Stat." preceded by a volume number and followed by one or more page numbers will be used hereinafter to refer to the United States Statutes at Large. All volumes so referred to have been officially published.

Public Law 808, Section 2, further provided for the transfer to the Panama Railroad Company of the assets of a corporation of New York of the same name, by enactment of Section 246(a), as follows:

> "246. *Investment of the United States.*—(a) As of the beginning of business July 1, 1948, the corporation shall issue to the United States, and deliver to the Secretary of the Treasury, a receipt for $1 acknowledging the transfer to the corporation, under the provisions of section 251 of this title, of the net assets of the Panama Railroad Company, hereinafter referred to as the 'New York company', a corporation created by an act of the Legislature of the State of New York passed on April 7, 1849, as amended by an act of that legislature passed on April 12, 1855, and which is wholly owned by the United States, and such receipt shall be evidence of the ownership of the corporation by the United States of America. In its capacity as owner of the corporation, the United States shall be represented by the President of the United States or such officer of the United States as may be designated by him, hereinafter referred to as the 'stockholder'."

The background and purpose of these provisions of Public Law 808 were explained in House Report No. 2396, 80th Congress, 2d Session, as follows:

> "The broad purpose of the bill (S. 2747) are to fulfill, through incorporation of the Panama Railroad Company by act of Congress, this requirement of the Government Corporation Control Act, and to provide a charter appropriate and adequate for the efficient and successful performance of the role assigned to the company.
>
> [fol. 24] "The company was incorporated by an act passed by the legislature of the State of New York, April 7, 1849. It operated under private control until 1881, when the original French Canal Co. acquired most of the 70,000 shares of its stock. This company and its successor, the New Panama Canal Co., continued to operate the railroad as a common carrier and also as an adjunct in their attempts to construct a canal. In

1904 their shares of stock in the Panama Railroad Co. (68,888 share) passed to the ownership of the United States as a part of the assets of the New Panama Canal Co., which were purchased for the sum of $40,000,000, as authorized by the Spooner Act of June 28, 1902 (34 Stat. 481). The remaining 1,112 shares were purchased from private owners in 1905.

"The company, which is an adjunct of the Panama Canal, operates the railroad across the Isthmus of Panama, which, although traversing the Canal Zone, has its freight and passenger terminals in the cities of Colon and Panama in the Republic of Panama. It also operates a steamship line between New York and the Isthmus, the docks and harbor terminals on the Isthmus, coaling plants for ships, commissary stores supplying employees and ships, dry and cold storage plants for supplies, two hotels, and the telephone system for the Canal Zone; all of a purely commercial character essential to the operation of the Canal, and the maintenance of employees required in the conduct of the Canal enterprise.

"Section 5 of title 2, Canal Zone Code (48 U. S. Code, sec. 1305) authorizes the President to govern and operate the Panama Canal and govern the Canal Zone through the Governor of the Panama Canal. Sections 51 and 52 of title 2 of the code authorizes the President to operate, through the Panama Canal or the Company, various business operations connected with the Canal.

"The policy of the United States, since the acquisition of the Panama Railroad Company in 1904, has been to make the company an adjunct, first to the construction of the Canal, and thereafter to the maintenance, operation, sanitation, government, and protection of the Panama Canal and the Canal Zone. The [fol. 25] company also performs subsidiary but important functions as a service organization for the Army, Navy, and other Government organizations, and as a transportation facility serving the needs of the Republic of Panama and the Canal Zone."

(An official publication of House Report No. 2396 is annexed hereto, marked "Exhibit B.")

It will thus be seen that defendant was originally created as the Panama Railroad Company to conduct certain business operations incident to the needs of the Panama Canal, the Canal Zone Government, and the Republic of Panama, such operations having been previously conducted by a New York corporation of the same name, the stock in which had been acquired by the Government in 1904 and 1905.

Properties Transferred Pursuant to the Act of August 12, 1949

6. The Act of August 12, 1949, by Section 2, enacted Sections 51 and 52, Title 2, of the Canal Zone Code, officially published at 63 Stat. 600-602.

Section 51(a) authorized the President to "establish, maintain and operate, through the Panama Railroad Company, or otherwise, docks, wharves, piers, drydocks," and similar properties.

Section 51(b) provided, in part, as follows:

> "(b) In the event the President has heretofore elected, or shall at any time hereafter elect, to maintain and operate through the Panama Railroad Company any of the facilities and appurtenances referred to in this section or section 52 of this title, theretofore maintained and operated by the Panama Canal, the President is authorized to transfer to the Panama Railroad Company all or as much as may be determined to be necessary * * *."

[fol. 26] Section 52 provided, in part, as follows:

> "The President may cause any or all of the facilities and appurtenances referred to in paragraph (a) or (b) of Section 51 of this title to be organized and conducted by the Panama Canal as 'business operations' * * *."

The apparent intent of Section 52 was to permit the President to authorize The Panama Canal to organize such operations in the first instance, but subsequently to transfer operations so organized to the defendant, then named the Panama Railroad Company.

Pursuant to the authority so conferred the President on January 31, 1950 issued Executive Order No. 10102, officially published at 15 Federal Register, 595. Executive Order No. 10102 provides, in part, as follows:

> "By virtue of the authority vested in me by section 51 of title 2 of the Canal Zone Code, as amended by section 2 of the act of August 12, 1949, 63 Stat. 600 (Public Law 223, 81st Congress), it is ordered as follows:
>
> "Section 1. The following-described buildings in the Canal Zone, now owned by The Panama Canal but utilized by the Panama Railroad Company in its commissary and harbor-terminals operations, are hereby transferred to the Panama Railroad Company:
>
> "(a) Commissary Annex, Ancon.
> "(b) Commissary, Madden Dam.
> "(c) Commissary, Diablo Heights.
> "(d) Combination Storehouse, Cristobal.
>
> "Sec. 2. The following-described docks and piers in the Canal Zone, now owned by The Panama Canal but operated by the Panama Railroad Company, are hereby transferred to the Panama Railroad Company:
>
> "(a) At the Atlantic terminal: Piers Nos. 6 and 16, and Mindi Dock.
> "(b) At the Pacific terminal. Docks Nos. 6 and 7, and Pier 18."

[fol. 27] (Then followed eight additional sections listing various properties; the order continued:)

> "Sec. 11. The foregoing provisions of this order shall take effect on July 1, 1950, except that section 5 and section 9 so far as it relates to section 5 shall become effective on February 1, 1950."

Operation of Canal Prior to Public Law 841

7. Prior to July 1, 1951 the Panama Canal was operated by a Governor appointed by the President pursuant to Section 4 of the Act of August 24, 1912, 37 Stat. 561, providing in part as follows:

> "The President is authorized to govern and operate the Panama Canal and govern the Panama Canal, or

cause them to be governed and operated, through a governor of the Panama Canal and such other persons as he may deem competent to discharge the various duties connected with the care, maintenance, sanitation, operation, government and protection of the canal and the Canal Zone."

Studies and Reports Leading to Enactment of Public Law 841

8. Public Law 841 authorized the transfer of the Panama Canal to the defendant. The enactment of Public Law 841 was preceded by a study by the Bureau of the Budget, transmitted by the President to the Speaker of the House of Representatives on January 31, 1950. An official publication of the study and the letter of transmittal constituting Document No. 460, House of Representatives, 81st Congress, 2d Session, is annexed hereto, marked "Exhibit C".

Subsequently H.R. 8677 was introduced in Congress, embodying many of the suggestions of this study.

The Senate Committee on Armed Services conducted a hearing and made a report on H.R. 8677. Official publica-
[fol. 28] tions of this hearing, held September 1, 1950, and of this report, Senate Report No. 2531, 81st Congress, 2d Session, are annexed hereto, together constituting a single exhibit, marked "Exhibit D".

These publications are helpful in the construction of Public Law 841 and will, or may, be quoted in the brief to be submitted by plaintiffs on the argument of this motion.

Public Law 841 Authorizes the Transfer of the Canal to Defendant and Sets Forth a Tolls Formula

9. Public Law 841, Section 2(a)(2), changed the name of defendant to "Panama Canal Company."

Public Law 841, Section 10, by the enactment of Section 256 of the Canal Zone Code, authorized the President to transfer the Panama Canal to defendant, as follows:

"256. Authorization for Transfer of Panama Canal to Corporation. The President is hereby authorized to transfer to the corporation the Panama Canal, to-

gether with the facilities and appurtenances related thereto, and any or all of the facilities and appurtenances heretofore maintained and operated by the Panama Canal under authority of section 51 of title 2 of the Canal Zone Code, as amended by section 2 of the Act of August 12, 1949 (ch. 422, 63 Stat. 601), and all or so much as he may determine to be necessary of the personnel, property, records, related assets, contracts, obligations, and liabilities of or appertaining to the said Canal and the aforesaid facilities or appurtenances, and such transfer shall be deemed to have been accepted and assumed by the corporation without the necessity of any act or acts on the part of the corporation except as otherwise stipulated in the provisions of section 246 of this title."

Public Law 841, Section 11, authorized the defendant to prescribe tolls.

[fol. 29] Public Law 841, Section 12, by the enactment of Section 412(b) of the Canal Zone Code, quoted *supra*, Section 3 hereof, provided for the prescription of tolls as follows:

"(b) Tolls shall be prescribed at a rate or rates calculated to cover, as nearly as practicable, all costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto, including interest and depreciation, and an appropriate share of the net costs of operation of the ageney known as the Canal Zone Government. In the determination of such appropriate share, substantial weight shall be given to the ratio of the estimated gross revenues from tolls to the estimated total gross revenues of the said corporation exclusive of the cost of commodities resold, and exclusive of revenues arising from transactions within the said corporation or from transactions with the Canal Zone Government."

As there may be question raised as to the meaning of the reference "facilities and appurtenances related thereto" appearing in Section 12 of Public Law 841, emphasis should be given to the use of the same phrase in Section 10. It is submitted that under applicable rules of statutory con-

struction the phrase has the same meaning in both sections of the same statute.

It is also clear that the phrase cannot refer to the so-called business operations of which defendant was already in possession, and of which it or its predecessor of the same name had been in possession for many years prior to Public Law 841; hence Congress cannot have intended to authorize the transfer of such "business operations" by Public Law 841.

The President Transfers the Canal to Defendant

10. Pursuant to Public Law 841, Section 10, the President, by Executive Order No. 10623, officially published at 16 Federal Register, 6333, 6336, transferred the Panama Canal "together with all the facilities, buildings, structures, and improvements related thereto", as follows:

> [fol. 30] "Section 1. There are hereby transferred to the Panama Railroad Company, a corporate agency and instrumentality of the United States which upon the effective date of this order shall, pursuant to the said act of September 26, 1950, be known as the Panama Canal Company, (a) the Panama Canal (the waterway), together with all the facilities, buildings, structures, and improvements related thereto, and (b) all other facilities, buildings, structures, and improvements whatsoever now maintained and operated by The Panama Canal, an independent agency of the United States which upon the effective date of this order shall, pursuant to the said act of September 26, 1950, be known as the Canal Zone Government: *Provided, however*, that there are excepted from such transfer the following-described facilities, buildings, structures, and improvements, situated on the Isthmus of Panama, which shall be for use and administration by the agency which upon the effective date of this order shall, pursuant to the said act of September 26, 1950, be known as the Canal Zone Government.
>
> . . . . .

"SEC. 8. This order shall become effective on July 1, 1951."

The related business operations, already being in defendant's possession, necessarily were not included within the transfer effected by Executive Order No. 10623.

Defendant Reports Canal Income, But Fails to Give Data Showing the Application of the Tolls Formula

11. Pursuant to Executive Order No. 10623 defendant took over the maintenance and operation of the Panama Canal, together with facilities and appurtenances related thereto, on July 1, 1951 (Exhibit A, p. 3; Exhibit E, p. 2). Official publications of defendant's annual reports for the fiscal years ended June 30, 1952, 1953 and 1954 are annexed hereto, marked "Exhibit E", "Exhibit F", and "Exhibit G", respectively.

Of special relevance are the income statements in each of these reports.

[fol. 31]

For the year 1952 the income statement appears on page 41 of Exhibit E as follows:

TABLE 3.—INCOME STATEMENT, YEAR ENDED JUNE 30, 1952

	Total	Canal activities	Commercial activities	Employees service activities	Other service activities
REVENUE AND INTRACOMPANY CREDITS:					
Canal tolls	$26,995,771	$26,995,771	.....	.....	.....
Credit for tolls on U. S. Government vessels	3,413,728	3,413,728	.....	.....	.....
Sales of commodities	25,312,769	.....	$ 133,454	$22,366,382	$ 2,812,933
Sales and services	21,912,929	2,347,861	9,438,069	2,842,359	7,284,640
Revenue from housing activities	2,135,871	.....	.....	2,135,871	.....
Services and sales to Canal Zone Government and intracompany credits	20,279,420	227,226	3,089,477	3,191,056	13,771,661
Total	100,050,488	32,984,586	12,661,000	30,535,668	23,869,234
OPERATING EXPENSES:					
Direct expenses	51,406,991	12,947,837	10,789,086	8,295,727	19,374,341
Cost of goods sold and transferred	22,109,809	.....	131,337	19,954,459	2,024,013
Allowances for depreciation	4,842,140	4,908,319	920,829	970,040	1,042,952
Annuity to Republic of Panama	430,000	430,000	.....	.....	.....
General and administrative expenses, net of revenue $83,293 and exclusive of $529,012 allocated to the Canal Zone Government	2,772,364	697,767	355,702	685,353	1,033,542
Total	81,561,304	15,983,923	12,196,954	29,305,579	23,471,848
OPERATING INCOME	18,489,184	17,000,663	464,016	630,089	394,386

[fol. 32]

TABLE 3.—INCOME STATEMENT, YEAR ENDED JUNE 30, 1952—Continued

GENERAL CORPORATE CHARGES (NET):	
Net cost of operation of Canal Zone Government	9,608,299
Maintenance of defense facilities	102,684
Loss on disposal of facilities made surplus by consolidation	46,381
Interest income	−263
Total	9,757,101
NET INCOME BEFORE INTEREST	8,732,083
INTEREST PAYABLE TO U. S. TREASURY	6,363,053
NET INCOME FOR YEAR (table 2)	2,369,030

NOTES

1. Material qualifications as to the tentative nature of this statement appear on pp. 33 and 34.
2. Intracompany credits, amounting to approximately $18,000,000, represent "revenue" arising from interactivity service charges. The charges are included in operating expenses except those representing cost transfers to construction in progress and inventories.

[fol. 33]

For the year 1953 the income statement appears on page 49 of Exhibit F, as follows:

TABLE 3.—INCOME STATEMENT, YEAR ENDED JUNE 30, 1953

	Total	Canal and related marine operations	Auxiliary operations	Employee services	Other supporting services
REVENUE:					
Canal tolls	$31,973,209	$31,973,209	.....	.....	.....
Credit for tolls on U. S. Government vessels	5,557,682	5,557,682	.....	.....	.....
Sales of commodities	25,972,408	.....	$ 59,647	$22,811,773	$ 3,100,988
Sales of services	22,992,888	2,507,863	10,373,067	3,060,958	7,051,000
Rental of quarters	2,157,581	.....	.....	2,157,581	.....
Total revenue	88,653,768	40,038,754	10,432,714	28,030,312	10,151,988
OPERATING EXPENSES:					
Direct expenses, including intra-Company cost transfers	50,976,039	12,426,502	11,510,368	9,102,826	17,936,343
Cost of goods sold and transferred	22,167,495	.....	50,568	19,724,962	2,391,965
Allowances for depreciation	4,719,964	1,846,569	935,557	856,301	1,081,537
General and administrative expenses, net of $81,705 revenue and of $585,421 allocated to Canal Zone Government	2,745,327	660,932	440,571	672,079	971,745
Accrual for overhauls of Canal locks	962,962	962,962	.....	.....	.....
Annuity to Republic of Panama	430,000	430,000	.....	.....	.....
Net proceeds from fixed assets retired	(104,266)	(70,462)	.....	(23,633)	(10,171)
Net book value of fixed assets retired	18,468	.....	347	7,447	10,674
	18,915,989	16,256,503	12,937,411	30,339,982	22,382,093

[fol. 34]

TABLE 3.—INCOME STATEMENT, YEAR ENDED JUNE 30, 1953—Continued

	Total	Canal and related marine operations	Auxiliary operations	Employee services	Other supporting services
REVENUE:					
Less intra-Company cost distributions and sales and services to Canal Zone Government	18,803,948	216,125	2,936,006	2,802,095	12,849,722
Net operating expenses	63,112,041	16,040,378	10,001,405	27,537,887	9,532,371
OPERATING INCOME	25,541,727	23,998,376	431,309	492,425	619,617
		(Table 4)	(Table 5)	(Table 6)	(Table 7)
GENERAL CORPORATE CHARGES, NET:					
Net cost of Canal Zone Government (including abandoned capital projects written off, $1,139,273)	11,319,656				
Abandoned capital projects of the Company written off	269,703				
Maintenance of idle defense facilities	140,742				
Nonoperating credits and miscellaneous income	(58,232)				
Total	11,671,869				
NET INCOME BEFORE INTEREST	13,869,858				
INTEREST PAYABLE TO U. S. TREASURY	6,668,895				
NET INCOME FOR YEAR AS TENTATIVELY STATED (note 1 and table 2)	7,200,963				

The notes on pages 50 to 51 are an integral part of this statement.

[fol. 35]

For the year 1954 the income statement appears on page 47 of Exhibit G, as follows:

TABLE 3.—INCOME STATEMENT, YEAR ENDED JUNE 30, 1954

	Total	Canal and other marine operations (table 4)	Allied maritime operations (table 5)	Supporting service operations (table 6)
REVENUE:				
Canal tolls	$33,302,149	$33,302,149	.....	.....
Credit for tolls on U. S. Government vessels	3,888,957	3,888,957	.....	.....
Sales of commodities	26,136,169	.....	.....	$26,136,169
Sales of services	20,643,557	2,874,650	$ 6,532,620	11,236,287
Rental of quarters	2,424,345	.....	.....	2,424,345
Total revenue	86,395,177	40,065,756	6,532,620	39,796,801
OPERATING EXPENSES:				
Direct expenses including cost transfers	48,700,739	14,326,406	6,464,846	27,909,487
Cost of commodities sold and transferred	22,002,671	.....	.....	22,002,671
Allowance for depreciation	4,610,744	1,777,491	479,325	2,353,928
Total operating expenses	75,314,154	16,103,897	6,944,171	52,266,086
Less costs transferred to other activities	17,250,035	301,982	1,929,571	15,018,482
Net operating expenses	58,064,119	15,801,915	5,014,600	37,247,604
OPERATING INCOME	28,331,058	24,263,841	1,518,020	2,549,197

[fol. 36]

TABLE 3.—INCOME STATEMENT, YEAR ENDED JUNE 30, 1954—Continued

GENERAL CORPORATE EXPENSE:	
Net cost of Canal Zone Government (table 3—Canal Zone Government)	10,366,079
Interest payable to U. S. Treasury (tentative)	8,847,255
Administrative and other general expenses (table 7)	4,957,714
Total	24,171,048
NET INCOME, AS TENTATIVELY STATED (table 2)	4,160,010

The accompanying "Notes Pertaining to the Financial Statements" are an integral part of this statement.

[fol. 37] (It will be observed that each of these statements refers to qualifying notes. I have examined these notes and have found that they do not apply to the comments hereinafter following as to the absence of allocations.)

A conspicuous feature of each of these income statements is the omission of any allocation either of interest or of the cost of the Canal Zone Government as between defendant's Canal operation and its other operations. In the 1954 statement defendant also omitted allocation of general and administrative expenses, although such allocation appears in the 1952 and 1953 statements.

Defendant thus in each annual report failed to show the costs of operation which the rate of tolls should be "calculated to cover" according to Section 12 of Public Law 841 (Section 412[b] of the Canal Zone Code).

In its 1954 audit report the GAO calculated what would cover the costs listed in Section 12, and showed excess revenues of $27,836,504.

12. No such showing appeared in any official publication until the GAO audit report for 1954. In this report the following table appeared at page 13 (Exhibit A hereto, already partially quoted in section 4 hereof):

[fol. 38]

	1954			Three years ended June 30, 1954		
	Canal activity	Business activities	Total	Canal activity	Business activities	Total
Revenue	$40,065,756	$46,329,421	$86,395,177	$112,861,870	$141,958,379	$254,820,249
Operating expenses, including adjustments in 1954 to prior years' retained income	15,801,915	42,262,204	58,064,119	44,436,726	129,556,812	173,993,538
Operating income	24,263,841	4,067,217	28,331,058	68,425,144	12,401,567	80,826,711
General corporate expense (allocated by General Accounting Office):						
Net cost of Canal Zone Government (note a)	6,737,951	3,628,128	10,366,079	19,153,898	12,140,136	31,294,034
Interest payable to U. S. Treasury (note b)	6,869,894	1,977,361	8,847,255	18,518,673	5,439,180	23,957,853
Administrative and other general expenses (note c)	1,125,351	3,832,363	4,957,714	2,916,069	9,630,222	12,546,291
	14,733,196	9,437,852	24,171,048	40,588,640	27,209,538	67,798,178
Net income (−loss)	$ 9,530,645	−$5,370,635	$ 4,160,010	$ 27,836,504	−$14,807,971	$ 13,028,533

(a) Net costs of Canal Zone Government are allocated on the revenue ratio defined in section 412(b) of the Canal Zone Code. This results in an allocation of 65 percent of these costs to the canal activity for 1954, 63 percent for 1953, and 55 percent for 1952. If the allocation were to be made on the basis of gross investment in fixed properties (see recommendation to the Congress, p. 9), about 78 percent of the costs would have been allocated to the canal activity.

(b) Interest for the fiscal years 1952, 1953, and 1954 is computed at 1.95, 2.05, and 2.342 percent, respectively, on $377,764,946, the net direct investment of the Government in the Company. Comments on interest expense are contained on page 19.

The capital base, that is, the gross investment in fixed properties, at June 30, 1954, used for allocating interest to all activities is $587,829,356 exclusive of defense facilities of $117,162,256. About 78 percent of this is invested in facilities of the canal activity and the remaining 22 percent in facilities of all other activities. This relationship has been approximately the same for the past 3 years.

(c) Most of the administrative and other general expenses were allocated on a direction-of-effort basis; the remainder was charged directly to the applicable activity. The direction-of-effort basis was used by the Company in 1953 for statistical purposes and seems reasonable. It results in an allocation of approximately 25 percent to the canal activity.

[fol. 39] So far as I am aware, neither the GAO nor defendant has officially published a calculation of the Canal operations for fiscal 1951 and 1952, giving effect to the allocations determined to be applicable by GAO in footnotes (a) and (b) of the foregoing table.*

The rates of tolls in effect July 1, to June 30, 1954, have thus been authoritatively "calculated" not only to "cover" the statutory costs but to exceed them by $27,836,504, which comes to about 26½% of tolls and toll credits, or about 24¢ a ton. Not only is this calculation [fol. 40] evidence of such excess collection of tolls, but also, for the reasons to be presented in the brief which will be submitted on the argument of the motion, the calculation is binding on defendant.

In addition to its footnotes the following comments by the GAO in the 1954 audit report are relevant to an under-

---

*The following table is an attempt to calculate the results for 1951 and 1952 on the basis of published figures:

CANAL OPERATIONS

	1952	1953
Operating income (from Exhibit E, p. 41, and Exhibit F, p. 49, adjusted for changed accounting treatment of channel improvements, depreciation, etc., and locks overhaul, Exhibit A, pp. 18, 19–20, 35–36, Exhibit F, p. 48)	$18,698,817	$23,810,876
Corporate charges:		
Net costs of operation of Canal Zone Government (a)	$ 5,284,564	$ 7,131,383
Interest payable to U. S. Treasury (b)	5,745,805	6,040,461
	$11,030,369	$13,171,844
Net income	$ 7,668,448	$10,639,032

(a) That is, 55% of $9,608,299 for 1952 (Exhibit E, p. 41) and 63% of $11,319,656 for 1953 (Exhibit F, p. 49).

(b) That is, 78% of $7,366,417 for 1952 and of $7,744,181 for 1953 (Exhibit A, pp. 19–20, 35–36, representing adjustments of figures shown in Exhibit E, p. 41, and Exhibit F, p. 49).

Channel improvements had long been treated as current expense. In 1954 defendant reclassified these entries as capital investment. This and other accounting reclassifications substantially increased interest charges but resulted in the elimination of certain current expense, and thereby increased income before interest. Recital herein of these accounting adjustments and other accounting statements by defendant and GAO is not intended to preclude plaintiffs from challenging any accounting entry not made according to law.

standing of the table heretofore quoted (Exhibit A, pp. 2-3):

"1. The legislative hearings and reports of congressional committees preceding the reorganization indicate the intention that the Company would be self-sustaining and the canal and business activities would each bear its own costs of operation, including interest, depreciation, and an appropriate share of the net cost of Canal Zone Government. History reflects the general feeling that tolls would have to be increased to $1 or more a ton.

The Company has had 3 years' operating experience under the Federal charter (2 Canal Zone Code 245 to 258, inclusive), as amended by the act of September 26, 1950 (64 Stat. 1038). The Company, as a whole, has been self-sustaining. However, the Company did not have available for our examination an analysis to determine the financial results by activities. We have prepared such an analysis by allocating general corporate expenses (interest, net cost of Canal Zone Government, and administrative and other general expenses) to the activity operating results reported by the Company. Also, the analysis shows the application of the adjustments proposed by our recommendations.

The analysis of the Company's reported net income of $13,000,000 for the 3 years since the reorganization shows that, contrary to the apparent expectation of the Congress, the canal activity had a net income of $28,000,000 and business activities had losses of $15,000,000. The term 'business activities' as used in this report includes all commercial and service activities, except the canal activity. Income from the canal activity and losses from the business activities were substantial in each year. (See further comments pp. 11 to 16.)

[fol. 41] Further, the analysis shows that if full amortization and interest costs are considered, the net income for the 3 years would be reported as $7,000,000, representing income of $22,000,000 from the canal activity and losses of $15,000,000 from the business activities. Thus the net income from the canal activity is being used to offset losses from business activities.

Section 255 of the Canal Zone Code authorizes appropriations for company-wide losses but does not authorize appropriations for losses from individual activities. We interpret the legislation as precluding any losses sustained by the Panama Canal Company in the operation and maintenance of business facilities being included in the basis for determining tolls under section 412 (b). Based on the financial results of the canal activity for the past 3 years, toll rates would have to be reduced substantially if hearings were held at this time. (See recommendation to Cong., p. 8.)

A decline in tolls revenue of about 10 percent arising from reduced rates or a lower volume of traffic without a corresponding reduction in losses from business activities would make it necessary for the Company to request appropriations to cover companywide losses. (Comments on factors affecting future operations appear on pp. 21 to 25.)"

And the following (from Exhibit A, p. 15):

"The Company's practice of establishing relatively low prices for commodities and services has resulted in fringe benefits to Canal organization employees and contributed to the losses sustained by business activities. Generally, sales of commodities and services to employees have been considered as transactions within the Canal organization, and, as such, the prices charged have not included all elements of Canal Zone Government costs and other general corporate expenses. In December, 1953 the Governor and the comptroller prepared a pricing policy statement for submission to the board of directors. Basically the policy conformed to the Company's practice for the past 2 years. However, the statement was not officially presented to the board because the Company's general counsel stated [fol. 42] that in his opinion the policy was not in accord with the intent and purposes of the basic legislation. We concur in the opinion of the general counsel that, insofar as transactions with the Company are concerned, employees have the same status as other customers.

> As of December 10, 1954, no further action had been taken by the management or board of directors to formalize the existing pricing policy."

13. As shown by official publications, defendant has never prescribed rates of toll.

Public Law 841, Section 11, provides that the rates of toll prevailing on its effective date shall continue in effect until changed as therein provided. Section 11 further provides that notice of any proposed change shall be published in the Federal Register. I have examined the volumes of the Federal Register containing notices published subsequent to July 1, 1951 and find no reference to any proposed change in Panama Canal tolls. It is evident from the GAO audit report that any prescription of tolls according to law would necessarily result in a change of rate.

Rates of toll were prescribed by the President by Proclamation No. 2247 of August 25, 1937, amended by Proclamation No. 2249 of August 31, 1937, officially published at Federal Register, Year 1937, Volume 2, Part 2, pages 1764-1774, 1796. These proclamations show that the rates therein provided are those in effect during 1954 as reported by defendant on page 2 of Exhibit F.

Said rates are (quoting from Exhibit F, p. 2):

> "(a) On merchant vessels, Army and Navy transports, colliers, tankers, hospital ships, supply ships, and yachts, when carrying passengers or cargo—ninety (90) cents per vessel-ton of 100 cubic feet of actual earning capacity—that is, the net tonnage determined in accordance with the Rules for the Measurment of Vessels for the Panama Canal;
> [fol. 43] (b) On vessels in ballast, without passengers or cargo—seventy-two (72) cents per vessel-ton;
> (c) On other floating craft—fifty (50) cents per ton of displacement."

Reference is also made to that sentence in the GAO audit report for 1954 quoted *supra* page 19: "However, the Company did not have available for our examination an analysis to determine the financial results by activities."

As the prescription of tolls would necessarily involve the financial results of the Canal activity as such, defend-

ant would presumably have had these results available for GAO examination if it had ever prescribed tolls.

Status of the Government Credits

14. Each of the annual income statements quoted in Section 11 hereof contains a revenue item entitled "Credit for Tolls on U. S. Government Vessels." These credits are presumably responsive to Section 12 of Public Law 841 enacting Section 412(c) of the Canal Zone Code, as follows:

> "(c) Vessels operated by the United States, including warships, naval tenders, colliers, tankers, transports, hospital ships, and other vessels owned or chartered by the United States for transporting troops or supplies, may in the discretion of the President of the United States be required to pay tolls. In the event, however, that such vessels are not required to pay tolls, the tolls thereon shall nevertheless be computed and the amounts thereof shall be treated as revenues of the Panama Canal Company for the purpose of prescribing the rates of tolls, and shall be offset against the obligations of the said corporation under paragraphs (c) and (e) of section 246 of this title, as amended."

I do not personally know whether or not the credit items in the annual statements refer to inter-agency credits from the Government agencies operating vessels transiting the Panama Canal, arranged through the Treasurer of the United States, or whether these items are only computa- [fol. 44] tions reflecting transits but not actual revenues either by way of money payments or inter-agency credits. I am informed that the latter is the case. Accordingly the Government agencies whose ships transited the Canal would have suffered no damage. The $27,836,504 figure reached by the General Accounting Office is nevertheless helpful in indicating the proportion of overcharge in the current toll rate. Obviously its use is not intended to suggest that plaintiffs and other shipowners whose ships transit the Canal are entitled to recover for themselves any portion of the toll credits for Government transits. I assume that the actual collection and distribution of damages will be in accordance with the procedure approved by the

United States Court of Appeals for the Second Circuit in *York* v. *Guaranty Trust Co.*, 143 F. 2d 503, 529, and *Dickinson* v. *Burnham*, 197 F. 2d 973, and more particularly described in this Court's opinion in *Dickinson* v. *Burnham*, reported at 11 F. R. S. 489.

Reason for Order to Show Cause

15. The reason why application is made for an order to show cause is that, under the Rules, on an ordinary notice of motion, the opposing party may file his affidavits the day before the return day. In this case, because of its importance and scope, though lacking a genuine issue of material fact, plaintiffs may require more than a single day to prepare reply affidavits.

Further, plaintiffs will require the guidance of defendant's answering affidavits in the preparation of their brief to be submitted on the argument of the motion.

Accordingly, plaintiffs have provided by the proposed order to show cause for additional time in respect of both service of reply affidavits and the period between the service of affidavits and the hearing of the motion.

For the same reason plaintiffs propose time additional to that required by the Rules for defendant's service of answering affidavits.

[fol. 45] Explanation of Service Provisions

16. Defendant has not yet answered, nor has any attorney appeared for defendant. Accordingly it will be necessary to serve defendant itself. As defendant is a corporate agency of the United States, prior to the appearance of an attorney on its behalf plaintiffs propose to effect service of the motion papers in the manner provided by Rule 4 for service of a complaint, that is, by service upon defendant and upon the United States Attorney for this District, and by registered mail, upon the Attorney-General of the United States. However, it has been difficult for plaintiffs to locate copies of all the exhibits. Hence I request that the Court permit that the annexation of the exhibits be dispensed with in respect of the papers to be served on the defendant and the United States Attorney for this District.

The reason that the Attorney-General is selected to receive the sets of papers with exhibits is that I am informed

that the case is being handled by officers of the Department of Justice in Washington, D. C. This information was received by me by telephone on September 29, 1955, from Mr. E. Robert Seaver of the New York Field Office of the Department of Justice, Room 1206, United States Courthouse, New York. Further, the Office of Public Relations, Department of Justice, Washington, D. C., on October 18, 1955 confirmed to me by telephone a story appearing in the Canal Zone newspaper "Panama American" on September 28, 1955 as follows:

"Justice Department Will Defend Canal's $27,000,000 Damage Suit

Washington, Sept. 28 (UP). The Justice Department has decided to represent the Panama Canal Company in a $27,000,000 damage suit, a spokesman said today.

[fol. 46] The company was named in a suit filed in Federal court at New York Sept. 13 by 12 United States steamship companies that claim they have been overcharged by that amount in excessive tolls since 1951.

The Company is an independent government agency, but wrote the Justice Department 'for our opinion on the employment of outside counsel,' the spokesman said.

'In view of the wide public interest we advised them that they should be represented by the Attorney General.'

The spokesman said he could give no indication at this time when replies to the suit will be filed or what procedures will be followed."

In connection with this request it is to be noted that the exhibits are all official publications of the defendant and other agencies of the United States, or of its legislative branch, and having to do with defendant's affairs. Copies thereof are presumably readily available to defendant and its counsel.

17. No previous application has been made for the relief herein sought.

Wherefore, deponent asks that the annexed order to show cause be granted.

C. Dickerman Williams.

Sworn to before me this 26th day of October, 1955. Myrtle Crooks, Notary Public, State of New York. Qualified in New York County. No. 31-0807450. Cert. Filed with City Register, N. Y. Co. Commission Expires March 30, 1957.

[fol. 47] EXHIBIT "A" TO MOTION

84th Congress, 1st Session House Document No. 160

REPORT ON AUDIT OF PANAMA CANAL COMPANY AND THE CANAL ZONE GOVERNMENT FOR THE FISCAL YEAR ENDED JUNE 30, 1954

Letter from the Comptroller General of the United States Transmitting a Report on the Audit of the Panama Canal Company and Canal Zone Government for the Year Ended June 30, 1954, Pursuant to the Government Corporation Control Act (31 U. S. C. 841), the Budget and Accounting Act, 1921 (31 U. S. C. 53), and the Accounting and Auditing Act of 1950 (31 U. S. C. 67)

May 16, 1955.—Referred to the Committee on Government Operations and ordered to be printed

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[fol. 48] REPORT ON AUDIT OF PANAMA CANAL COMPANY AND CANAL ZONE GOVERNMENT FOR THE FISCAL YEAR ENDED JUNE 30, 1954

General Comments

The Division of Audits, General Accounting Office, has made an audit of the Panama Canal Company and the Canal Zone Government for the year ended June 30, 1954, pursuant to the Government Corporation Control Act (31 U. S. C. 841), the Budget and Accounting Act, 1921 (31 U. S. C. 53), and the Accounting and Auditing Act of 1950

(31 U. S. C. 67). Our audit work in the Canal Zone was completed on December 10, 1954; however, this report contains comments on the effect of significant actions taken subsequent to that date.

We are making two new recommendations to the Congress in this report: (1) that a specific plan for liquidating the investment of the United States Government in the Panama Canal Company be incorporated into the basic legislation and (2) that the formula for establishing toll rates be amended to include the recovery of losses sustained by the Company in the operation of business activities. (See p. 8.)

The recommendations to the Congress and the President of the United States made in our 1953 report (H. Doc. 473, 83d Cong.) are briefly restated on pages 9 to 14, as they are still applicable, except for those relating to consolidation of Canal Zone hospitals and interest on interest during construction. The status of recommendations made to the board of directors of the Company and the Governor of the Canal Zone in prior years is summarized in appendix B.

This report contains comments on certain operations of the Armed Services in the Canal Zone in order to present to the Congress a broad picture of the major Government activities in that area. Canal organization officials have no control over military activities, but the Canal organization activities are greatly affected by the presence of the Armed Services. Armed Services personnel and their dependents comprise about half of the total population, and a significant part of the land area is under military control. Thus military and Canal organization activities are closely interwoven and, in many cases, duplicated. Many key positions in the Canal organization are held by Army and Navy officers on normal tour of duty assignments.

The financial and operating data of the Panama Canal Company and the Canal Zone Government are presented as though they constituted a single organization, because the two entities are closely integrated in their administration and operation. We are unable to state that the accompanying financial statements (exhibits 1–7) present fairly the financial position of the Canal organization at June 30,

1954, or the result of operations for fiscal year 1954 for the following reasons:

1. About 75 percent, or $340,000,000, of the cost of construction and improvement of the Panama Canal has not been depreciated or amortized since 1914. (See p. 27.)
[fol. 49] 2. The inventory and appraisal of properties is still incomplete. (see p. 27.).
3. An undetermined amount of excess, slow-moving, and obsolete stock is included in inventories at cost. (See p. 27.)
The management expects to complete the inventory and appraisal in 1956. Any adjustments to property or inventory accounts will affect the net investment of the Government, annual interest charges, and the amount of indebtedness to the Treasury at June 30, 1954. Property adjustments will also involve changes of annual depreciation charges.

During 1954 the Company recorded substantial adjustments to the accounts for prior years, reclassified and regrouped some of the activity accounts, and changed the form of operating statements. Thus the statements presented in this report are not fully comparable with those presented in previous audit reports.

The following significant matters were observed during our audit:

1. The legislative hearings and reports of congressional committees preceding the reorganization indicate the intention that the Company would be self-sustaining and the canal and business activities would each bear its own costs of operation, including interest, depreciation, and an appropriate share of the net cost of Canal Zone Government. History reflects the general feeling that tolls would have to be increased to $1 or more a ton.

The Company has had 3 years' operating experience under the Federal charter (2 Canal Zone Code 245 to 258, inclusive), as amended by the act of September 26, 1950 (64 Stat. 1038). The Company, as a whole, has been self-sustaining. However, the Company did not have available for our examination an analysis to determine the financial results by activities. We have prepared such an analysis by allocating general corporate expenses (interest, net cost

of Canal Zone Government, and administrative and other general expenses) to the activity operating results reported by the Company. Also, the analysis shows the application of the adjustments proposed by our recommendations.

The analysis of the Company's reported net income of $13,000,000 for the 3 years since the reorganization shows that, contrary to the apparent expectation of the Congress, the canal activity had a net income of $28,000,000 and business activities had losses of $15,000,000. The term "business activities" as used in this report includes all commercial and service activities, except the canal activity. Income from the canal activity and losses from the business activities were substantial in each year. (See further comments pp. 11 to 16.)

Further, the analysis shows that if full amortization and interest costs are considered, the net income for the 3 years would be reported as $7,000,000, representing income of $22,000,000 from the canal activity and losses of $15,000,000 from the business activities. Thus the net income from the canal activity is being used to offset losses from business activities.

Section 255 of the Canal Zone Code authorizes appropriations for company-wide losses but does not authorize appropriations for losses from individual activities. We interpret the legislation as precluding any losses sustained by the Panama Canal Company in the operation and maintenance of business facilities being included in the basis for determining tolls under section 412 (b). Based on the [fol. 50] financial results of the canal activity for the past 3 years, toll rates would have to be reduced substantially if hearings were held at this time. (See recommendation to Cong., p. 3.)

A decline in tolls revenue of about 10 percent arising from reduced rates or a lower volume of traffic without a corresponding reduction in losses from business activities would make it necessary for the Company to request appropriations to cover companywide losses. (Comments on factors affecting future operations appear on pp. 21 to 25.)

2. There were no major consolidations or eliminations of duplicate activities and related facilities operated in the Canal Zone by Federal Government agencies, other than

hospitals. Details of the minor changes made over the past 2 years are shown on page 5.

In September 1954 hospital facilities of the Canal Zone Government and the Armed Services were consolidated and the number of hospitals in the Canal Zone reduced from four to two. This consolidation resulted from action on the part of the Congress (sec. 106, Civil Functions Appropriation Act, 1955). (See p. 6.)

Creation and Authority

The Panama Canal Company (known as Panama Railroad Company until 1951) was created in 1849 under the laws of the State of New York as a private corporation, acquired by the United States in 1905, and reincorporated under a Federal charter in 1948 pursuant to the requirements of the Government Corporation Control Act. It is the principal agency of the United States in the Canal Zone. It is responsible for the operation and maintenance of the canal and business activities and is authorized to use its revenues to finance its operating expenses and capital expenditures on a self-sustaining basis.

The Canal Zone Government (known as Panama Canal agency until 1951) was established in 1914. It is responsible in the Canal Zone for the various activities connected with civil government. The operating and capital expenditures are financed from funds appropriated annually by the Congress. Collections of school tuitions, hospital fees, and other fees and fines are required to be covered into the Treasury as miscellaneous receipts.

The Company is required to reimburse the Treasury for interest on the Government's net direct investment in the Company, the annuity paid to the Republic of Panama, and the net cost of operation of the Canal Zone Government, which is deemed to be an integral part of the cost of operation of the Panama Canal enterprise as a whole.

Effective July 1, 1951, the Canal Zone Government and the Company entered into an agreement whereby the Company provides certain essential services for the Canal Zone Government.

Management and Organization

The management of the Company is by law vested in its board of directors, consisting of between 9 and 13 members;

the management of the Canal Zone Government is vested in the Governor of the Canal Zone. Both organizations are subject to the supervision of the President of the United [fol. 51] States. This supervision has been delegated to the Secretary of the Army (formerly Secretary of War) since the United States undertook to construct the canal.

The Secretary of the Army has been designated by the President of the United States as sole stockholder of the Company. In this capacity, he appoints the members of the board of directors, except the Governor, and those appointed serve at his pleasure. (See appendix A for list of directors at June 30, 1954.)

The board of directors elect and fix the compensation of a vice president, a comptroller, and a secretary. They do not elect or fix the compensation of the president of the Company.

The Governor of the Canal Zone is appointed for a term of 4 years by the President of the United States, subject to Senate confirmation (2 Canal Zone Code 6), and receives an annual salary of $15,000. He is the administrative head of the Canal Zone Government, ex officio, a member of the board of directors of the Panama Canal Company, president of the Company, and its chief executive officer. Traditionally, the governors have been high ranking officers of the Corps of Engineers, United States Army, generally serving their last tour of active duty; and many of their subordinates, both in the Canal Zone Government and the Company, have been and continue to be officers of the Armed Services assigned by the military agencies for periods of 2, 3, or 4 years.

Many members of the board of directors have been or are closely associated with the Armed Services. The attendance at the 15 board meetings held since the reorganization in July 1951 ranged from 8 to 12 directors, and, except for one meeting, the majority of the directors were either officials, employees, or former officers of the Department of the Army. No board meetings were held in the Canal Zone between October 1952 and December 1954, although subcommittees of the board met in the Canal Zone during this period. On July 24, 1954, the Company's bylaws were amended to require at least one meeting each year in the Canal Zone.

No major organizational changes, other than those reported in our 1953 report, were made during fiscal year 1954. However, some changes were made which appear to have facilitated coordination of related activities, but did not contribute to the over-all reduction in force. The management staff in the office of the comptroller was abolished, and the duties, other than budgetary and fiscal duties, were transferred to a new executive planning staff in the office of the Governor-President. The motor transportation division was transferred from the supply and service bureau (renamed supply bureau) to the railroad and terminal bureau (renamed transportation and terminal bureau). The Tivoli Guest House was transferred from the supply and service bureau to the community services bureau.

[fol. 52] Recommendations to the Congress

New Recommendations

The following two new recommendations are made as a result of our 1954 audit.

1. Plan for liquidating investment of the United States Government

We recommend that the Canal Zone Code be amended to incorporate a plan for systematic refunding to the Treasury of the investment of the United States Government in the Panama Canal Company.

Under present legislation, the board of directors of the Company is required to appraise, at least annually, its necessary working capital requirements, together with reasonable foreseeable requirements for authorized plant replacement and expansion, and to pay into the Treasury as dividends the amount of funds in excess thereof (section 253, title 2, of the Canal Zone Code).

The Company has retained large amounts of cash on hand to finance long-term construction projects and for contingencies. The only capital returned to the Treasury by the Company since the reorganization in 1951 was $10,000,000 in November 1954. This return of capital resulted primarily from action taken by the Bureau of the Budget.

Because of the reluctance of the board of directors to cover into the Treasury cash in excess of immediate needs, we believe that a specific plan for reducing the Government's investment should be provided in the law. The plan should require the refundment annually of an amount at least equal to the depreciation and amortization for the year. This would make it necessary for the Company to obtain additional capital contributions from the Congress to finance authorized major plant replacement and expansion, as provided by section 246, title 2, of the Canal Zone Code.

The existing legislation provides that the Company reimburse the Treasury annually for the net cost of Canal Zone Government, including depreciation on properties. Thus, the investment of the United States Government in the Canal Zone Government is being liquidated in a systematic manner.

Other related recommendations to the Congress appear on pages 9 and 10.

2. Recovery of business activity losses through tolls

We recommend that paragraph (b) of section 412, title 2, of the Canal Zone Code, be amended to require that losses sustained by the Panama Canal Company in the operation of business activities be included in the basis for determining toll rates.

This recommendation is based on our belief that all losses of operating business activities necessary in support of the canal activity, directly or indirectly, should be recoverable through tolls. Such losses, however, should be [fol. 53] kept to an absolute minimum by efficient and economical business practices.

Comments on operating losses of the business activities are contained on pages 2 to 5, and 14 to 16.

Prior Recommendations

Our audit report for fiscal year 1953 contained 15 recommendations to the Congress for changes in basic legislation. The one relating to interest on interest during construction has been deleted. In view of the continuing interest of the congressional committees in the remaining recommendations, and our opinion that the recommended changes are still needed, they are repeated in summary

form. Complete details on each recommendation are contained on pages 16 to 31 of our 1953 audit report (H. Doc. 473, 83d Cong.).

1. Creation of a single independent agency

Combine the Panama Canal Company and the Canal Zone Government into a single independent entity with broad powers similar to those of the present Company.

2. Establishment of a single administrator or a small board

Establish a small full-time resident board or a single administrator to replace the present 13-man part-time board.

3. Transfer of emergency fund into United States Treasury as a dividend

Repeal section 254 of title 2, Canal Zone Code, which requires the Company to maintain an emergency fund of $10,000,000 in the United States Treasury and enact legislation requiring the Company to transfer the $10,000,000 into the Treasury as a dividend.

4. Depreciation of Canal construction costs

Amend paragraph (b) of section 412, title 2 of the Canal Zone Code, and require that prescribed toll rates be calculated to cover adequate provisions for depreciation or amortization of Canal construction costs (over the estimated useful life of the waterway from 1914, or from the date the asset was placed in service if later than 1914, but in no event to extend beyond 2014).

5. Payment of interest on the net investment in Canal Zone Government

Amend paragraph (c) of section 246, title 2 of the Canal Zone Code, to require the Company to pay interest on the net investment of the United States Government in the Canal Zone Government.

6. Changes in cost recovery formula

Amend paragraph (b) of section 412, title 2 of the Canal Zone Code, to include an allowance for contingencies in the costs to be recovered through tolls and to require, for toll rate purposes, the allocation of an appropriate share

of the net costs of Canal Zone Government to transiting activities on the basis of gross investment in fixed properties, if a formula is to be specified in the legislation. In this connection, see recommendation to the Congress on pricing policy, page 11.

[fol. 54] 7. Direct payments to the Canal organization by other Government agencies

Repeal that part of paragraph (c) of section 412, title 2 of the Canal Zone Code, which pertains to offsetting tolls on Government vessels against the Company's obligations payable into the Treasury and require, through enabling legislation and appropriations, that other Government agencies reimburse the Canal organization for tolls and the costs of any services rendered.

8. Uniform salary differentials and sick and annual leave privileges for Government employees

Make existing legislation and regulations pertaining to salary differentials and sick and annual leave applicable uniformly to all Government employees in the Canal Zone, and authorize a central agency to determine the salary differential to be paid to all Government employees in the Canal Zone.

9. Transfer of Canal Zone postal service to the Post Office Department

Transfer the Canal Zone postal service to the United States Post Office Department. The postal service is conducted, in general, in accordance with the laws, rules, rates, and regulations of the Post Office Department. This change would conform present operation of the postal service in the Canal Zone to that in territories and possessions of the United States.

10. Limitation on personal services for the Governor

Include a limitation in future appropriation acts on expenditures for the residence, furnishings, limousines, and personal services provided for the Governor.

11. Limitation on entertainment expenses

Provide for a single limitation on entertainment expenses of the Canal Zone Government and the Panama Canal Company in future appropriation acts.

12. Cash requirements for capital expansion

Amend section 253, title 2 of the Canal Zone Code, to require that determinations of excess cash to be paid into the Treasury by the Company be based on plant replacement and expansion needs for the ensuing year rather than on needs for long-term construction projects.

13. Payment of a dividend by the Company.

Require the Company to refund $15,000,000 to the Treasury, as warranted by the current position at June 30, 1953. Cash funds at June 30, 1954, were about $5,000,000 greater than at June 30, 1953. The Company paid $10,000,000 into the Treasury in November, 1954. We believe that the remaining $5,000,000 should be paid. After payment of this amount, the Company's cash funds would still be excessive to immediate needs. However, we make no recommendation for the further payment of a specific amount because of the uncertainty of the effect on cash requirements of (1) possible wage increases for U. S. rate employees, (2) provisions of the pending treaty with Panama, (3) free vacation travel benefits, (4) possible abandonment of the railroad, etc. (See p. 21.)

[fol. 55] 14. Pricing policy

Consider amending the Canal Zone Code to set forth principles to be followed in determining prices for commodities and services furnished by the Canal organization to its employees and other customers. (See p. 15.)

Prior Recommendations to the President of the United States

In our 1953 report we made three recommendations to the President of the United States. The one on utilization of hospitals in the Canal Zone has been adopted. (See p. 3.) The remaining two recommendations are still applicable.

1. Investigation of duplicate facilities

Have an investigation made of the duplication of facilities throughout the entire Canal Zone, including those operated by the Company, Canal Zone Government, the Armed Services, and other Government agencies, by persons not connected with the Canal organization or the Armed Services in the Canal Zone. (See p. 4.)

2. Services and materials furnished to the District Court and its employees without reimbursement

Rescind section 6 of Executive Order 7676, dated July 26, 1937, which requires the Canal organization to furnish quarters, utility services, office supplies and equipment, and transportation of court officials in the Canal Zone, including housing to three court officials, without charge. The Comptroller General, in decision B–121815 dated March 16, 1955, directed the Governor to take immediate steps to require the three district court officials to pay a reasonable rental for the quarters occupied by them.

Operations

The Company classified fiscal year 1954 operating results into the following categories: (1) canal and other marine operations, (2) allied maritime operations, and (3) supporting services. The Company made no allocations of general corporate expenses in the financial statements. These expenses include interest payable to the United States Treasury, net cost of Canal Zone Government, and administrative and other general expenses. Such allocations need not be recorded in the accounts but are necessary periodically to determine the adequacy of prices charged by each activity.

Details of the Company operating results and administrative and other general expenses, summarized in exhibit 4, are shown in schedules 1 through 4. Exhibit 7 shows the detail of Canal Zone Government operating results. A list of the main operating functions is shown in appendix C.

Results of Operations

Reported net income of the Company for fiscal year 1954 was $4,160,010, after deducting the net cost of Canal Zone Government of $10,366,079, interest of $8,847,255, and depreciation of $4,710,461. Reported net income as adjusted for the 2 years 1953 and 1952 was $8,868,523, making [fol. 56] a total of $13,028,533 for the 3 years since the July 1, 1951, reorganization.

Unrecorded and nonreimbursed costs

The Company generally follows the policy of reporting only those costs which, by law, are recoverable through tolls.

Therefore, the reported net income excludes the costs of amortizing the waterway and interest on the investment in Canal Zone Government. Conversely, operating expenses include nonreimbursed costs of performing services for other Government agencies in the Canal Zone. When these unrecorded net costs and nonreimbursed costs, as estimated by the General Accounting Office, are taken into account, the net income for fiscal year 1954 and for the 3 years ended June 30, 1954, is substantially the same as reported by the Company. (See p. 13.)

We believe that all costs, including those excluded from recovery through tolls, should be disclosed in the financial statements. When all cost information is available, toll rates can be calculated on any basis specified by law. Complete reporting of the results of operations, financial position, and the net investment of the Government would keep the Congress informed as to the costs not being recovered because of existing legislation, treaty agreements, or the inadequacy of toll and other rates. The Panama Canal is an international waterway. In 1954 almost 90 percent of the tolls revenue was derived from commercial vessels of United States and foreign registry. Under the circumstances the importance of reporting all costs and recovering them through tolls and other tariffs cannot be overemphasized, because losses incurred in the operation of the canal would represent subsidies by the Government to operators of commercial vessels, most of them foreign. (See recommendations to the Congress, pp. 9 and 10.)

Determination of operating results by activity and effect of General Accounting Office recommendations

In order to determine the adequacy of toll rates and prices charged by the Company for commodities and services, general corporate expenses must be allocated to the individual activities. We made allocations of interest, administrative and other general expenses, and the net costs of Canal Zone Government on the bases explained in the footnotes on page 13. A similar study was not made by the Company.

A summary of operating results for the year 1954 and for the 3-year period ended June 30, 1954, adjusted to reflect our recommendations concerning interest and depreciation, follows.

[fol. 57]

	1954			Three years ended June 30, 1954		
	Canal activity	Business activities	Total	Canal activity	Business activities	Total
Revenue	$40,065,756	$46,329,421	$86,395,177	$112,861,870	$141,958,379	$254,820,249
Operating expenses, including adjustments in 1954 to prior years' retained income	15,801,915	42,262,204	58,064,119	44,436,726	129,556,812	173,993,538
Operating income	24,263,841	4,067,217	28,331,058	68,425,144	12,401,567	80,826,711
General corporate expense (allocated by General Accounting Office):						
Net cost of Canal Zone Government (note a)	6,737,951	3,628,128	10,366,079	19,153,898	12,140,136	31,294,034
Interest payable to U. S. Treasury (note b)	6,869,894	1,977,361	8,847,255	18,518,673	5,439,180	23,957,853
Administrative and other general expenses (note c)	1,125,351	3,832,363	4,957,714	2,916,069	9,630,222	12,546,291
	14,733,196	9,437,852	24,171,048	40,588,640	27,209,538	67,798,178
Net income (−loss)	9,530,645	−5,370,635	4,160,010	27,836,504	−14,807,971	13,028,533
Adjustments proposed by General Accounting Office:						
Additional depreciation of waterway (note d)	2,900,000		2,900,000	8,650,000		8,650,000
Reduction of interest by transfer of waterway at net amortized value, July 1, 1951 (note d)	−2,100,000		−2,100,000	−5,700,000		−5,700,000
Depreciation on capitalized interest during construction (note e)	500,000		500,000	1,500,000		1,500,000

	1954			Three years ended June 30, 1954		
	Canal activity	Business activities	Total	Canal activity	Business activities	Total
Interest on the investment of the United States in Canal Zone Government (note f)	420,000	230,000	650,000	1,050,000	700,000	1,750,000
	1,720,000	230,000	1,950,000	5,500,000	700,000	6,200,000
Net income (−loss) after proposed adjustments (note g)	$7,810,645	−$5,600,635	$2,210,010	$22,336,504	−$15,507,971	$6,828,533

(a) Net costs of Canal Zone Government are allocated on the revenue ratio defined in section 412 (b) of the Canal Zone Code. This results in an allocation of 65 percent of these costs to the canal activity for 1954, 63 percent for 1953, and 55 percent for 1952. If the allocation were to be made on the basis of gross investment in fixed properties (see recommendation to the Congress, p. 9) about 78 percent of the costs would have been allocated to the canal activity.

(b) Interest for the fiscal years 1952, 1953, and 1954 is computed at 1.95, 2.05, and 2.342 percent, respectively, on $377,764,946, the net direct investment of the Government in the Company. Comments on interest expense are contained on page 19.

The capital base, that is, the gross investment in fixed properties, at June 30, 1954, used for allocating interest to all activities is $538,829,356 exclusive of defense facilities of $117,162,256. About 78 percent of this is invested in facilities of the canal activity and the remaining 22 percent in facilities of all other activities. This relationship has been approximately the same for the past 3 years.

(c) Most of the administrative and other general expenses were allocated on a direction-of-effort basis; the remainder was charged directly to the applicable activity. The direction-of-effort basis was used by the Company in 1953 for statistical purposes and seems reasonable. It results in an allocation of approximately 25 percent to the canal activity.

(d) About $290,000,000 of costs have been incurred by the Canal organization for excavation, fill, titles and treaty rights, etc., mainly in connection with the original construction of the waterway and dredging improvements of $34,000,000 since 1914 added to construction costs in 1954. Assuming a life of 400 years, which is used for the lock chambers and other structures, annual depreciation or amortization of $2,900,000 would be required to recover the costs for 1954 or $8,650,000 for the 3-year period since the reorganization of July 1, 1951. On the other hand, if depreciation had been accumulated over the 37 years from 1914 to 1951, when the assets were transferred to the present Company, the base on which interest is payable to the United States Treasury would be reduced by about $72,000,000. At the interest rates in effect for each of the 3 years, this would reduce interest expense for the period by about $5,700,000, $1,800,000 for each of the years 1952 and 1953 and $2,100,000 for 1954. The net increase in expenses would thus be $800,000 for 1954 and $2,950,000 for the 3-year period.

(e) Interest during construction was originally calculated to be $128,991,063 on the basis of compound interest but was later reduced to $50,892,311 on the basis of simple interest. This amount is excluded from the interest base. At a life of 100 years for canal properties, annual depreciation of about $500,000, or $1,500,000 for the 3 years, would be required. Depreciation from 1914 to 1951 would be $18,000,000.

(f) The investment of the United States Government in the Canal Zone Government, $28,000,000, is non-interest-bearing. Interest on this amount would have amounted to $650,000 for 1954 and $1,750,000 for the 3 years and has been allocated on the same basis described in note a.

(g) The Canal Zone Government would have recovered an estimated $2,000,000 for 1954 and $6,000,000 for the 3 years from the Armed Services if full charges could have been made during 1952, 1953, and 1954 for costs of hospital, school, police, postal, sanitation, and health services. If these costs had been recovered, the net income would have been about $4,200,000 for 1954 and $13,000,000 for the 3 years. About $1,300,000 and $3,700,000, respectively, would have been allocable to the canal activity on the same basis described in note a. We estimate that more than $1,000,000 of hospital and school costs will be recovered from other Government agencies in 1955 under provisions of section 107 of the Civil Functions Appropriations Act, 1955.

[fol. 58] Operating losses of business activities

It is obvious from the foregoing summary that the canal activity has recovered the major part of the general corporate charges and provided the Company's entire margin of income. Also, tolls at the present rates have recovered those interest and amortization charges which we have recommended for inclusion in the toll rates calculation. Conversely, the business activities have not recovered a proportionate share of general corporate charges. Approximate losses for the individual activities, based on our allocation methods, are shown below. Any other reasonable allocation would produce generally the same results.

	1954	3 years ended June 30, 1954
Allied maritime operations:		
Marine terminals	$210,000	$930,000
Vessel repair	290,000	840,000
Hotel Washington	80,000	210,000
Supporting services:		
Transportation and utilities:		
Railroad	530,000	1,370,000
Motor transportation	200,000	410,000
Steamship line	230,000	960,000
Power system	160,000	630,000
Telephone system	50,000	290,000
Water system	80,000	370,000
Employees' services:		
Commissaries	820,000	1,630,000
Service centers	350,000	1,080,000
Housing:		
U. S. rate (including furniture and garage rental and other miscellaneous services)	470,000	1,890,000
Local rate	500,000	1,120,000
Other supporting services:		
Engineering and maintenance	650,000	1,920,000
Supply	290,000	70,000
Tivoli Guest House	50,000	110,000
Printing plant	50,000	120,000
Grounds maintenance	50,000	100,000
Unallocated—nonrecurring corporate expense	210,000	760,000
	$5,370,000	$14,810,000

The losses in the business activities are attributable in a large degree to the high cost incurred in employing United States citizens in positions that could be filled locally. United States citizens constitute a large community in the Canal Zone and are used in all except the very lowest grades of labor. To obtain United States citizens for work in the

tropics, the Company incurs abnormal expenses in the form of premium wages, additional leave, free vacation travel, recruitment, and repatriation. Also, the Company bears most of the net cost of furnishing services generally provided by state and municipal governments by including only a part of these costs in prices to the customers of the business activities.

A report entitled "Study of Overseas Personnel and Pay Practices of Sixteen Private Firms" jointly prepared in November 1952 by the Bureau of the Budget, Civil Service Commission, Department of State, and Department of Defense states that (1) the number of United States citizens employed by the firms under study ranged from one-half of 1 percent to 5 percent of the total number of overseas employees and (2) native workers are employed in almost every category of position including responsible technical and executive posts.

The Virgin Islands Corporation, a wholly owned Government corporation in the Caribbean area, employs less than [fol. 59] 10 continental United States citizens out of a total of about 1,200 employees who, although United States citizens, are natives of the Virgin Islands or Puerto Rico and receive compensation comparable to that paid by businesses in that area.

From 1921 to date, except for the World War II period, about 25 percent of Canal organization employees have been United States citizens. (See p. 53.) U. S. rate employees in the Canal Zone hold positions in all categories except journeymen's helpers, day laborers, porters, custodians, stevedores, sales clerks, messenger, etc. This compares unfavorably with the practice of commercial companies operating overseas. The wisdom of operating supporting facilities for a disproportionate number of United States citizens is seriously questioned.

We believe that the proportion of United States citizens could be substantially reduced at the present time by employing Panamanians in many semiskilled and clerical jobs. Under a proper program of apprenticeship and training, Panamanians could fill positions requiring greater skills and responsibilities. The transition would not mean a wholesale firing of present employees but could be accomplished largely by attrition. There is an urgent need for long-range planning, full-time direction, and continuity

of management to cope with these problems. (See recommendations 1, 8, and 9, appendix B.)

Revenues from business activities have been adversely affected by reductions in the number of employees who are the principal customers. The proposed treaty between the United States and Panama is expected to result in further reductions in employee-customers. As the number of employees in the Canal Zone is reduced, a policy of basing prices at levels in effect in the United States becomes more urgent.

The Company's practice of establishing relatively low prices for commodities and services has resulted in fringe benefits to Canal organization employees and contributed to the losses sustained by business activities. Generally, sales of commodities and services to employees have been considered a transaction within the Canal organization, and, as such, the prices charged have not included all elements of Canal Zone Government costs and other general corporate expenses. In December 1953 the Governor and the comptroller prepared a pricing policy statement for submission to the board of directors. Basically the policy conformed to the Company's practice for the past 2 years. However, the statement was not officially presented to the board because the Company's general counsel stated that in his opinion the policy was not in accord with the intent and purposes of the basic legislation. We concur in the opinion of the general counsel that, insofar as transactions with the Company are concerned, employees have the same status as other customers. As of December 10, 1954, no further action had been taken by the management or board of directors to formalize the existing pricing policy.

We offered a possible solution to the pricing problem in our 1953 audit report. We recommended that the legislative committees consider amending the Canal Zone Code to set forth principles for determining prices. (See recommendation to the Congress, p. 11.) We suggested as one of the basic principles that prices, other than tolls, be established at levels in effect in cities in the United States, for example, Washington, D. C., Miami, New Orleans, or a combination [fol. 60] of several places. We did not propose that prices be set on individual items, but, rather, on cost-of-living indexes prepared by the Bureau of Labor Statistics. The

purpose of the suggestion was to relate the pricing policy to salary and wage levels of Canal Zone employees, which are set at present to correspond to those paid Federal employees and others in the United States plus a 25 percent incentive differential for employment in the Canal Zone. The pricing policy would help to stabilize the economy and protect employees against higher prices than those paid by other Federal employees in the United States. This policy assures reasonable prices to employees and may increase the revenues of the Company, but operating losses will continue to be substantial. Also, the pricing policy would eliminate the necessity for fringe benefits, cost-of-living differentials, and any allocation formulas for general expenses, interest, and civil government costs to determine prices or toll rates.

The adoption of a policy of rigid economy in the operation of the business activities and increasing prices for goods and services is not the sole answer to the problem. Some of the business activities are basically unprofitable because of a volume of business insufficient to support them economically. The solution may lie, to some extent, in eliminating or curtailing such operations as the steamship line and the railroad, and using available commercial steamship services and trucks instead, consideration of which we have previously recommended.

In any event, we believe that under an efficient and economical operation the business activities in the aggregate would continue to show losses; however, these losses would be reduced to a minimum. Such losses represent a cost of operating the waterway and, therefore, must ultimately be borne by the canal activity. If tolls revenue is insufficient to cover the minimum losses, appropriations will be needed. Such appropriations for the business losses would, of course, constitute a subsidy to ship operators. (See recommendation to the Congress, p. 8.)

Change in nature of operation.

There was little change in the nature of the operations during the year, although there were some transfers of functions between divisions and some consolidations of facilities. The Republic of Panama assumed responsibility for garbage collection and sanitation in the cities of Colon

and Panama at the beginning of the year and thus relieved the Canal Zone Government of a substantial annual expense. The Department of the Navy reimbursed the Company in 1954 for the cost of maintaining idle defense facilities. In 1953 the cost of providing this service, amounting to $140,742, was recorded as a general corporate expense.

During the year some of the Canal Zone Government policemen assigned to guard duties at Panama Canal Company installations were replaced by local rate guards employed by the Company. This not only reduced personnel costs but transferred the cost from the Canal Zone Government to the Company.

[fol. 61]

Tolls

Tolls revenue

Tolls revenue, tonnage handled, and the number of transits by ocean-going vessels were higher in 1954 than anticipated, only slightly lower than the record levels of 1953. Commercial tolls and transits were higher than in 1953 because of increased traffic by ships of foreign registry. A decline in the number of transits by United States Government vessels and the related tolls credit approximately offset the increase in tolls and transits of commercial vessels. Comparative traffic and tonnage statistics for 1954 and 1953 are shown in appendix E. Comparative revenues for the 2 years follow.

	1954		1953	
	Amount	Percent of tolls revenue	Amount	Percent of tolls revenue
Tolls revenue:				
Ocean-going commercial vessels:				
U. S. registry	$10,987,045	27	$10,613,921	28
Foreign registry:				
Panamanian	2,356,326	6	1,796,289	5
Other	20,804,492	56	19,507,868	52
	33,247,863	89	31,918,678	85
Coastal vessels (under 300 tons)	54,286	...	55,131	...
U. S. Government vessels	3,888,957	11	5,557,682	15
	$37,191,106	100	$37,530,891	100

Toll rates

The Company collects tolls for all vessels transiting the canal except vessels of the Republic of Panama, war vessels

of the Republic of Colombia, and vessels transiting the canal solely to undergo repair in the Company's shops. Prior to July 1, 1951, vessels owned, operated, or chartered by the United States Government transited the canal free, but since that date the Company has received credit against its obligations to the United States Treasury for tolls on these vessels, calculated at regular rates.

Tolls are levied against cargo-carrying vessels on the basis of Panama Canal net tons, 100 cubic feet of cargo-carrying space. The present rates, in effect since 1938, are 90 cents a ton for laden vessels and 72 cents for vessels in ballast. Noncargo vessels are charged 50 cents a displacement ton.

The Company is authorized to prescribe toll rates and rules for the measurement of vessels (2 Canal Zone Code 411). Any changes, however, must be published in the Federal Register 6 months in advance of the effective date, during which period open hearings must be held, and the new rates become effective only upon approval of the President of the United States whose action is final and conclusive.

Tolls shall be prescribed at a rate or rates calculated to cover, as nearly as practicable, all costs of maintaining and operating the canal, together with the facilities and appurtenances related thereto, including interest, depreciation, and an appropriate share of the net costs of Canal Zone Government (2 Canal Zone Code 412 (b)). Excluded from the formula by specific provision of the code or by omission from section 412 (b) are (1) interest on the investment in Canal Zone Government, (2) interest on interest during construction, (3) costs allocable to national defense, and (4) amortization of $340,000,000 for cost of construction [fol. 62] and improvement of the waterway. We believe these costs, except interest on interest during construction and costs allocable to national defense, should be included in the formula. (See recommendations to the Congress, pp. 8 and 9.)

[fol. 63] Factors Affecting Future Operating Results

Future operating results of the Canal organization may be affected materially by the following factors:

1. Treaty with Republic of Panama
2. Salary increases for Federal employees

3. Removal of slide hazard at Contractors Hill
4. Conversion of electrical system
5. Free vacation transportation for employees and their families
6. Recovery of school and hospital costs
7. Abandonment of railroad and construction of highway

Some of these factors involve changes in the scope or type of operations with resultant changes in the number of employees required. Any change in the number of employees in any one activity has an effect on the operation of all supporting services, because employees are the principal users of housing, commissary, utility, school, hospital, and other services.

Some of these factors tend to decrease employment levels, although temporary increases may result in a few areas. As a reduced volume of business will increase the unit costs in the supporting operations, the management should keep abreast of changing operating conditions and minimize losses by consolidating facilities or discontinuing nonessential operations. The financial effects of all these changes are unknown, because the management has not had sufficient time to make a complete forecast.

Treaty with Republic of Panama

On January 25, 1955, a "Treaty of Mutual Understanding and Cooperation between the United States of America and the Republic of Panama" and "Memorandum of Understandings Reached" were signed by representatives of the two countries. These agreements will not become effective until ratified by both governments. Legislation will be needed to accomplish some of the provisions. Nevertheless, we are including comments on certain of the provisions because of their possible effect on future operations.

Annuity

The annuity paid by the United States to Panama would be increased from $430,000 to $1,930,000, thus increasing the annual cost of operations by $1,500,000.

Salaries and wages

The Congress will be requested to enact legislation authorizing the establishment of a single basic wage scale

and providing for uniform application of the Civil Service Retirement Act for all United States and Panamanian employees of the United States Government in the Canal Zone. Panamanian citizens would be afforded equality of opportunity for employment in all Government positions in the Canal Zone for which they are qualified, and all Government positions in the Canal Zone would be evaluated, classified, and titled without regard to the nationality of the incumbent or proposed incumbent.

The extent to which these benefits will affect annual payroll costs cannot be determined until all positions in the Canal organization have been classified. At June 30, 1954, [fol. 64] there were 10,951 full-time employees on the local rate rolls, of whom 7,281 were Panamanian citizens, and the remainder were either citizens of other countries or their citizenship was undetermined. The average annual salary of local rate employees in the Canal Zone during 1954 was $1,310; the average annual salary of United States citizen employees, including the 25 percent differential was $6,062. In some areas local rate and U. S. rate employees perform similar duties, although substantially all of the skilled craftsmen and supervisors are United States citizens.

Commissary and other employee services

As a means of enabling the Panamanian economy to obtain an increased share in the business of supplying the Canal Zone market, the following actions are proposed.

1. The Panama Canal Company will discontinue manufacturing and processing goods for sale to or consumption by individuals when it is determined that such goods are and will continue to be available in Panama in satisfactory quantities, quality, and at reasonable prices.

2. As of December 31, 1956, commissary, import and other privileges, except those essential to health or necessary to performance of duties, will be withdrawn from non-United States citizen employees of Canal Zone agencies who do not reside in the Zone.

3. As of December 31, 1956, all United States agencies in the Canal Zone will discontinue selling supplies (except fuel and lubricants) to ships except those owned or operated by the United States Government.

4. Items imported for resale in the Canal Zone will be acquired from United States or Panamanian sources unless it is not feasible to do so in certain instances.

At June 30, 1954, almost 500 employees, mostly local rate, were engaged in manufacturing and processing operations. Many of these employees will not be needed if the manufacturing and processing operations are performed in Panama.

Sales in local rate commissaries in 1954 amounted to about $9,400,000. The withdrawal of commissary privileges from about 7,000 non-United States citizens who reside in Panama will reduce these sales by about $6,000,000. About two-thirds of the 356 employees in the local rate commissaries (330 local rate and 26 U. S. rate) will not be needed if the number of local rate commissaries is reduced to a minimum.

Estimated sales of supplies to ships in 1954 were somewhat less than $2,000,000.

Ferry operations

Congressional authority and appropriations will be sought for the construction by the United States of a bridge across the canal at Balboa on the Pacific side of the Isthmus. This would remove the need for operating the present ferry service, which cost about $560,000 in 1954. There were 97 employees engaged in the ferry service at June 30, 1954.

[fol. 65] Transfers of properties to Republic of Panama

The Congress will be requested to enact legislation authorizing conveyance without charge to the Republic of Panama of title to certain lands and improvements owned by the Company in territory under Panamanian jurisdiction when and as it is determined that these lands and improvements are no longer needed for the operation, maintenance, sanitation, or protection of the canal or its auxiliary facilities. These lands and improvements include the railroad yard and station in Panama City and properties in Colón.

Annual interest expense will be reduced if these lands and improvements are donated to Panama, because the

base on which interest is calculated will be reduced in accordance with section 246 (d) of the Canal Zone Code.

Terminal operations

When Panamanian port facilities in Colon are in operation, prompt consideration will be given to discontinuing the handling of commercial cargo for transshipment to Panama and other countries on Canal Zone piers.

Commercial cargo transshipments comprise a substantial part of the terminal business, most of which is handled on the Atlantic side adjacent to Colon.

At June 30, 1954, there were 1,907 employees engaged in terminal operations, of whom 1,824 were local rate. Many of these employees would not be needed if commercial terminal operations are discontinued.

During 1954 the operating margin of the terminals division before general corporate charges was $1,250,137, or about 30 percent of the operating margin of the business activities.

Salary Increases for U. S. Rate Employees

The Congress has been considering salary increases for Federal employees. A general increase in U. S. rate employees' salaries will increase the operating costs of all Canal organization activities.

Removal of Slide Hazard at Contractors Hill

Late in fiscal year 1954 the president of the Company reported that movements in the agglomerate mass in Contractors Hill on the banks of Gaillard Cut (formerly Culebra Cut) indicated a condition of increasing instability which warranted immediate study to determine possible action. Geologists from the Corps of Engineers and from civilian life were called to the Canal Zone for consultations.

In a report to the board of directors in May 1954 the president summarized the geological findings and recommended preventive action. The board approved the president's recommendations and authorized him to take every further action necessary to meet the emergency, including employing experts and consultants and entering into contracts by negotiation or otherwise.

On May 25, 1954, the Company contracted with the Tecon Corporation of Dallas, Texas, for the removal of approximately 2,350,000 cubic yards of rock and earth from Contractors Hill within a period of 15 months. The total cost of the contract work will depend on the number of cubic [fol. 66] yards of material removed, but it is estimated that it will amount to about $3,400,000, including $300,000 for mobilization of equipment at the site. The estimated total cost is about $5,000,000, including planning, engineering, inspection, and other work by Company employees. In a meeting on July 24, 1954, the board of directors approved a recommendation of the comptroller that this cost be treated as a deferred charge to maintenance and amortized at the rate of $200,000 a year beginning with fiscal year 1955. In the past, work of this nature has been classified as a capital improvement. If the cost were to be amortized over the same period as the remaining useful life of the lock chambers, the annual charge would be about $85,000.

Conversion of Electrical System

The Canal Zone electrical system still operates on 25-cycle current generated at the Company's power plants. This type of current was selected during construction days as most suitable for locks operations. In recent years it has become increasingly difficult and costly to obtain 25-cycle industrial and domestic equipment. The board of directors therefore has approved a plan to convert the electrical system to 60-cycle at an estimated cost of $24,000,000, including $11,000,000 for conversion of locks machinery and replacement of towing locomotives and other locks equipment. Conversion of the entire system is scheduled for completion in 1961.

The cost of equipment will be materially higher than that being replaced, resulting in higher annual charges for depreciation than at present.

Vacation Travel

The Administrative Expenses Act of 1946 (60 Stat. 806) was amended on August 31, 1954, to provide free round-trip vacation transportation to Government employees and their immediate families from posts of duty overseas to their place of actual residence in the United States. The

amendment specifies that in order to obtain this free transportation an employee must have completed an agreed period of service overseas and, prior to his departure, must have agreed in writing to serve another tour of duty at the same or some other overseas post. Twenty-six months is considered a tour of duty in the Canal Zone.

Prior to enactment of this legislation, it was the Company's policy to permit employees to return to the United States annually on the steamship line at a 75 percent discount in fare. Employee discounts, except for special cases, were discontinued effective November 1, 1954. Many employees may now wish to travel directly to their places of residence rather than through New York City, the only United States port of call of the steamship line. Only 43 percent of the employees have declared the Middle and North Atlantic States as their places of residence. A substantial decline in the number of employee-passengers would be another factor in considering the continued operation of the steamship line on the present basis.

Although the Company was already absorbing 75 percent of the cost of ocean transportation for most vacationing employees and their families (see p. 19), additional costs will be incurred for inland transportation.

[fol. 67] Recovery of School and Hospital Costs

The Civil Functions Appropriation Act, 1955, provides that other Government agencies will reimburse the Canal Zone Government for their full proportionate share of the cost of school and hospital services. We estimate that these costs will amount to more than $1,000,000 in 1955.

Abandonment of Railroad and Construction of Highway

In October 1954 the board of directors approved recommendations by the president of the Company that the Panama Railroad be abandoned, that a trans-Isthmian highway totally within the Canal Zone be constructed as soon as possible by the Canal Zone Government at an estimated cost of $9,000,000, and that the Company include in the 1956 budget provision for the purchase of a fleet of motor vehicles for the transportation of Canal organization freight and passengers. We are informed that the principal reason for constructing a new highway totally

within the Canal Zone is that the present trans-Isthmian highway is under the jurisdiction of the Republic of Panama.

Railroad operations have been unprofitable for several years (after allocation of general corporate expenses), principally because of increasing competition from motor transportation, including military and private Panamanian, operating over the United States-built trans-Isthmian highway in the Republic of Panama. The reported net operating income for 1954 before general corporate charges was $24,085 compared with $124,046 for 1953 before similar charges. Operating income was insufficient in either year to cover a proportionate share of administrative and other general expenses.

At June 30, 1954, the net cost of railroad facilities and equipment which would be abandoned was $1,544,288, after deducting accumulated depreciation and valuation allowances totaling $10,691,741. In 1954 annual depreciation charges amounted to $90,349. It appears that both operating costs and the number of U. S. rate employees would be substantially reduced through the use of motor vehicles on the present trans-Isthmian highway.

In our opinion traffic over the existing trans-Isthmian highway is insufficient to warrant a new highway at this time, and a new highway should not be constructed unless it is necessary for defense. The Department of the Army pays for the maintenance of the present highway and we know of no restrictions imposed by the Republic of Panama on its use by Government agencies and their employees.

If a defense highway is to be built, the Congress should approve the construction and appropriate the necessary funds to the Department of Defense. In any event estimates of construction costs should be obtained from private contractors before starting the project.

[fol. 68] Investment of the United States Government

The amounts of the United States Government's net direct investment in the Company and in the Canal Zone Government are subject to adjustment upon completion of the inventory and appraisal of assets. Appraisal of the assets transferred to the Company from the Panama Canal agency on July 1, 1951, is required by law. The Canal

organization is also appraising all other properties so that all property valuations will be stated on a consistent basis.

The tentatively stated investment of the United States in the Panama Canal Company and Canal Zone Govern- [fol. 69] ment at June 30, 1954, is summarized. (See exhibits 3 and 6 for details of changes in investment during the year.)

Panama Canal Company:		
Net direct investment:		
Par value of capital stock of original Company, wholly owned by the United States since 1905		$ 7,000,000
Net recorded value of assets and liabilities transferred from Panama Canal agency pursuant to Executive Orders 10102 and 10263, including proceeds from subsequent disposal of properties transferred at no value		406,519,807
Gross direct investment		413,519,807
Less:		
Dividends paid into the U. S. Treasury from 1904 to 1950	$23,994,905	
Fair market value of land conveyed to Republic of Panama	11,759,956	35,754,861
Net direct investment at June 30, 1954, interest-bearing (exhibit 3)		377,764,946
Total accumulated income, as defined in Company's Federal charter, non-interest-bearing		85,032,832
Total investment (2 Canal Zone Code 246) of U. S. Government in Panama Canal Company at June 30, 1954 (exhibit 3)		462,797,778
Canal Zone Government:		
Investment of the U. S. Government, representing excess of assets over liabilities at June 30, 1954, as recorded, non-interest-bearing (exhibit 6)		28,107,764
Total investment of the U. S. Government at June 30, 1954, as tentatively stated (exhibit 1)		$490,905,542

Survey of the Accounting System

The Canal organization improved its central accounting system substantially during 1954, but much remains to be done to improve procedures in the accounting performed at operating levels. Making these improvements will take time because the numerous activities in which the organiza-

tion is engaged (see appendix C) are widely scattered throughout the Canal Zone. The job has been delayed because the system's staff is small. It is difficult to recruit qualified men for system work in the Canal Zone because the Company is unwilling to offer adequate salaries. (See p. 54.)

On July 1, 1953, a revised and improved chart of accounts was adopted, new bookkeeping machines were placed in operation to facilitate current posting to the general ledger accounts and to the voluminous job order accounts, and reporting procedures were revised. The accounting system for the hospitals is being revised.

One of the basic requirements of any accounting system is timely reporting of useful data to management and to operating supervisors. Before any reports are made, the system should provide reasonable controls to assure the accuracy of information being disseminated. The revised reporting is deficient because the information given to operating supervisors is not readily useful and the system places reliance on the unit supervisors to disclose inaccuracies.

The accounting system is deficient at present because urgently needed improvements have not been made at operating levels. Controls over the preparation and distribution of basic documents at the operating levels should be strengthened, and many of the accounting forms should be revised or eliminated. In our opinion, these areas should receive the immediate attention of the Company's system staff.

[fol. 70] Scope of Audit

Our audit of the Panama Canal Company and Canal Zone Government for the fiscal year 1954 included a review of the procedures and controls, a selective examination of transactions, and an examination of the financial statements as of June 30, 1954. We examined selected transactions to the extent deemed appropriate under existing circumstances and to settle the accounts of fiscal officers for the year ended June 30, 1954, with due regard for the nature and volume of transactions and the effectiveness of management controls. Our audit was conducted in the Canal Zone and in the Company's branch office in New York City.

Opinion of Financial Statements

The accompanying financial statements are based on the accounting records. Except for reclassifications, the statements of the Panama Canal Company are the same as those published in "The Budget of the United States Government for the Fiscal Year Ending June 30, 1956."

Fixed assets, allowances for depreciation, inventories, indebtedness due the Treasury, investment of the United States Government, and related expenses are subject to adjustments upon completion of the appraisal and inventory of assets transferred to the Company at July 1, 1951, as required by law to be made by the Company and approved by the Director of the Bureau of the Budget.

No depreciation or amortization has been provided since 1914 on $340,000,000 of construction and improvement costs of the Panama Canal, including capitalization interest during construction. This represents about 75 percent of the total construction cost.

A reserve of $50,892,311 has been established completely offsetting capitalized interest during construction. Consequently, the financial statements do not show properly the total investment of the United States.

For reasons given above and further comments contained in notes 4, 5, and 8 to the financial statements, we are unable to state that the accompanying balance sheets (exhibits 1, 2, and 5), and the related statements of income or net cost of operations (exhibits 4 and 7) and of changes in investment of the United States Government (exhibits 3 and 6) present fairly the financial position of Panama Canal Company and Canal Zone Government at June 30, 1954, or the results of their operations for the year then ended.

[fol. 71] Notes to Financial Statements—June 30, 1954

4. Inventories of materials and supplies are valued generally at average cost landed at the Isthmus, exclusive of United States freight to port of embarkation, less a valuation allowance of $512,660 representing the cost of a part of the obsolete, slow-moving, and excess materials and supplies acquired by transfer from the Panama Canal agency. A reclassification and reappraisal of the remaining items are in process.

[fol. 72] 8. Ownership of the Company by the United States Government is evidenced by a receipt held by the Secretary of the Treasury. Section 246, title 2, Canal Zone Code, provides for the amount of the ownership receipt to be changed from time to time so as to represent the net direct investment of the United States in the Company. The changes are specified as resulting from (a) funds advanced to the Company from the Treasury pursuant to appropriation by the Congress to meet increased capital needs, (b) transfers of assets, less liabilities, to the Company from other Government agencies, pursuant to applicable provisions of law, (c) conversely, transfers from the Company to other Government agencies, and (d) dividends paid to the Treasury and other expenditures and losses as a result of directives based on national policy, not related to the Company's operations, and not reimbursed by specific appropriations.

Before July 1, 1951, when the waterway and appurtenances and other business enterprises of the Panama Canal agency were transferred to the Company pursuant to the act of September 26, 1950, the dividends and other expenditures and losses, analogous to dividends, had greatly exceeded the total capital contributions and the amount of the ownership receipt stood at the nominal amount of $1. Effective with this transfer, the total direct investment was greatly increased, even though final determination of the amount of the transfer has not yet been made. The accounts of the Company, adjusted to June 30, 1954, show the amount of the net assets transferred at July 1, 1951, to be $377,764,946. The amount was net of $25,507,098, representing the excess of prior years' dividends and other repayments over total direct investment to June 30, 1951. It has been clearly recognized that the value for transfer, as provided for in the Company's Federal charter, cannot be determined until the appraisal has been completed and approved by the Director of the Bureau of the Budget. No change has yet been made in the amount of the ownership receipt.

Except for the adjusted reported net income for the 1952, 1953, and 1954 fiscal years, totaling $13,028,533, and about $4,000,000 of undistributed net earnings of the Panama Railroad Company before acquisition by the United States, the accumulated income retained was earned by the Com-

pany during its status as an adjunct to the Panama Canal agency when its principal operations consisted of the commissaries, steamship line, railroad, and marine terminals.

A further provision in section 246 requires that the Company reimburse the Treasury for the interest cost of the Government's net direct investment in the Company. However, paragraph (e) of section 412 provides for the deduction of capitalized interest during construction from the amount of the Government's investment subject to interest.

The net direct investment was reduced in November 1954 by a capital refundment of $10,000,000 paid into the United States Treasury pursuant to section 253 of title 2 of the Canal Zone Code.

[fol. 73]

APPENDIX E

OPERATING STATISTICS

Panama Canal Company

Canal and Other Marine Operations

Canal traffic by nationality of vessels:

	1954		1953	
	Number of transits	Long tons of cargo (000 omitted)	Number of transits	Long tons of cargo (000 omitted)
Ocean-going commercial vessels:				
U. S. registry	2,056	11,868	2,166	12,661
Foreign registry:				
Panamanian	611	3,666	444	2,592
British	1,265	7,727	1,365	7,877
Norwegian	831	3,484	877	3,303
Japanese	387	2,481	320	2,113
Honduran	347	493	400	570
German	323	708	230	353
Danish	275	936	206	885
Swedish	230	819	182	735
Liberian	224	1,416	131	931
Italian	211	1,160	141	678
Colombian	205	241	144	145
Greek	146	1,247	92	829
French	136	583	141	567
Netherlands	130	685	112	495
Ecuadorean	106	93	152	88
All others (1954—17 countries; 1953—18 countries)	301	1,488	307	1,273
Total	7,784	39,095	7,410	36,095
Coastal vessels (under 300 tons)	1,222	66a	1,294	67a
U. S. Government vessels	1,139	4,603a	1,466	6,496a
	10,145		10,170	

aPanama Canal net tons.

[Fol. 74] EXHIBIT "B" TO MOTION

HOUSE OF REPRESENTATIVES

80th Congress, 2d Session Report No. 2396

AMENDING THE CANAL ZONE CODE FOR THE PURPOSE OF INCORPORATING THE PANAMA RAILROAD COMPANY

June 17, 1948—Committed to the Committee of the Whole House of the State of the Union and ordered to be printed

Mr. Weichel, from the Committee on Merchant Marine and Fisheries, submitted the following

REPORT

[To accompany S. 2747]

The Committee on Merchant Marine and Fisheries to whom was referred the bill (S. 2747) to amend the Canal Zone Code for the purpose of incorporating the Panama Railroad Company, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

Purpose of the Bill

Section 304(b) of the Government Corporation Control Act, approved December 6, 1945, prohibits the continued existence, as an agency or instrumentality of the United States, after June 30, 1948, of any wholly owned Government corporation created by or under the laws of any State; and requires the proper corporate authority of every such corporation to institute dissolution or liquidation proceedings before that date, with the proviso, however, that any such corporation may prior thereto be reincorporated by act of Congress for such purposes and term of existence and with such powers, privileges, and duties as authorized by such act, including the power to take over the assets and assume the liabilities of its respective predecessor corporation.

The broad purposes of the bill (S. 2747) are to fulfill, through incorporation of the Panama Railroad Company by

act of Congress, this requirement of the Government Corporation Control Act, and to provide a charter appropriate and adequate for the efficient and successful performance of the role assigned to the company.

The company was incorporated by an act passed by the legislature of the State of New York April 7, 1849. It op- [fol. 75] erated under private control until 1881, when the original French Canal Co. acquired most of the 70,000 shares of its stock. This company and its successor, the New Panama Canal Co., continued to operate the railroad as a common carrier and also as an adjunct in their attempts to construct a canal. In 1904 their shares of stock in the Panama Railroad Co. (68,888 shares) passed to the ownership of the United States as a part of the assets of the New Panama Canal Co., which were purchased for the sum of $40,000,000, as authorized by the Spooner Act of June 28, 1902 (38 Stat. 481). The remaining 1,112 shares were purchased from private owners in 1905.

The company, which is an adjunct of the Panama Canal, operates the railroad across the Isthmus of Panama, which, although traversing the Canal Zone, has its freight and passenger terminals in the cities of Colon and Panama in the Republic of Panama. It also operates a steamship line between New York and the Isthmus, the docks and harbor terminals on the Isthmus, coaling plants for ships, commissary stores supplying employees and ships, dry and cold storage plants for supplies, two hotels, and the telephone system for the Canal Zone; all of a purely commercial character essential to the operation of the Canal, and the maintenance of employees required in the conduct of the Canal enterprise.

Section 5 of title 2, Canal Zone Code (48 U.S. Code, sec. 1305) authorizes the President to govern and operate the Panama Canal and govern the Canal Zone through the Governor of the Panama Canal. Sections 51 and 52 of title 2 of the code authorizes the President to operate through the Panama Canal or the Company's various business operations connected with the Canal.

The policy of the United States, since the acquisition of the Panama Railroad Company in 1904, has been to make the company an adjunct, first to the construction of the Canal, and thereafter to the maintenance, operation, sani-

tation, government, and protection of the Panama Canal and the Canal Zone. The company also performs subsidiary but important functions as a service organization for the Army, Navy, and other Government organizations, and as a transportation facility serving the needs of the Republic of Panama and the Canal Zone.

The President exercises his supervision and control over both the Panama Canal and the Panama Railroad Company through the Secretary of the Army, and the Governor of the Panama Canal is always President of the Company. This provides the proper coordination of all of their activities. Your committee considers it essential that the operations of the company be in complete harmony with the agency that maintains and operates the Canal which serves the commerce of the world in peacetime but is devoted largely to the needs of the war effort in wartime.

Explanation of Bill by Sections

The bill adds at the end of chapter 12 of title 2 of the Canal Zone Code a new article numbered 3, embracing new sections 245 to 256 of said title 2.

The purposes of the corporation are so stated in section 245 as to describe it broadly as the business adjunct of the Panama Canal. It authorizes the President to conduct [fol. 76] through the corporation the various business operations incident to United States Government activities on the Isthmus of Panama. The statement of the broad purposes of the corporation bears a direct relationship to the provision in the organic act of August 24, 1912 (now sec. 5 of title 2, Canal Zone Code; 48 U. S. Code, sec. 1305), which will not be changed by this legislation, authorizing the President to govern and operate the Panama Canal and govern the Canal Zone through the Governor of the Panama Canal, and to the authority vested in the President by section 6 of the organic act (now secs. 51 and 52 of title 2, Canal Zone Code; 48 U. S. Code, sec. 1323) to conduct various business operations incident thereto.

The provisions of the section dealing with the offices of the corporation and with its residence for venue purposes are in substantial effect continuations of the situation now prevailing with reference to the present corporation.

Section 246 contains provisions relating to the investment of the United States in the corporation.

Subsection (a) will require the corporation to deliver to the Secretary of the Treasury a receipt acknowledging the transfer to the new corporation of the net assets of the present corporation to evidence the ownership of the corporation by the United States. In its capacity as owner of the corporation, the United States will be represented by the President of the United States or such officer of the United States as may be designated by him.

Subsection (b) will require the amount of the receipt to be increased by the amount of any additional direct investments of the United States in the corporation due to (1) funds advanced to the corporation, and (2) any transfer of property to the corporation from other Government agencies pursuant to applicable provisions of law.

Subsection (c) will require the corporation to pay interest to the Treasury of the United States on the net direct investment of the Government in the corporation.

Subsection (d) prescribes the method by which the corporation shall account for its surplus. Credit items will include income from operations after 1904, when the Government acquired control of the company, together with undistributed net income prior to 1904. The debit items will include (1) payments to the Treasury of the United States as dividends not applied as offsets to direct capital contributions, and (2) extraordinary expenditures or losses incurred through directives based on national policy and not related to the operations of the company such as Public Law 28, approved May 3, 1943. These debit items are applicable against directly contributed capital in determining the base on which the corporation will be required to pay interest.

Section 247 vests the management of the corporation in a Board of Directors. It would permit the restriction of the Board of Directors to 9 persons, rather than 13 as at present, and would expressly authorize the stockholder to hold office as a director, as the Secretary of the Army does at the present time. The section makes a matter of law the present practice that the Governor of the Panama Canal be a director and the president of the corporation in the

interests of the necessary coordination of activities of the Canal-Railroad organization.

The provision negativing salaries for Board members follows the present practice. The provision as to per diem [fol. 77] allowance in lieu of subsistence and as to traveling expenses is deemed necessary and proper. The sentence respecting appointment and service as a director, officer, or employee of the Company, of any officer or employee of the United States is based generally upon like provisions in other Federal charters.

As suggested by the General Accounting Office representatives, the bill provides that a majority of the Board of Directors shall constitute a quorum for the transaction of business instead of five members as at present.

Section 248 grants the corporation certain general powers. Subsections (a), (b), (c), and (d), concerning corporate succession, seal, bylaws, and the power to sue and be sued, follow general corporate patterns and appear to require no comment. Subsection (e) relative to officers and employees follows generally the pattern of similar provisions in Government corporation acts, such as the Reconstruction Finance Corporation Act and the Tennessee Valley Authority Act. As in these acts, the appointment and compensation of officers and employees are not subject to civil-service and classification laws in the interests of providing greater flexibility in such appointments. It ~~would include~~ per annum employees under personnel ceiling determinations but not those in other categories whose numbers fluctuate from day to day and month to month with the great fluctuation in the volume of business which is dependent on factors beyond the control of the Company, such as the handling of cargo at the docks and terminal facilities and the furnishing of supplies and services to ships using *using* the Canal and its ports.

Subsections (f), (g), (h), and (i), relative to contracts, priority out of bankrupt estates, obligations and expenditures, and the acquisition, administration, and disposition of property, also follow general corporate patterns.

The first three subsections of section 249 enumerate the enterprises, facilities, and appurtenances which the Company may maintain and operate. The enumeration includes the various business operations which the President

is now authorized by law to conduct, through the Canal-Railroad organization, incidental to the maintenance and operation of the Panama Canal and government of the Canal Zone.

Subsection (d) restricts the operations to those permitted under the treaty with the Republic of Panama.

Subsection (e) would extend the franking privilege to the corporation under the same conditons as executive departments.

Subsection (f) authorizes such actions as are necessary or appropriate to carry out the powers conferred on the corporation. The programs and activities to be undertaken by the corporation are restricted to those included in its annual budget program submitted to and approved by Congress and those which may be transferred to it. An exception is provided to enable the corporation with appropriate limitations to take emergency action within the scope of the charter when Congress is not in session. It requires that a report on any such emergency activity be presented promptly to Congress, when it reconvenes, for its approval and such action as it may deem necessary or desirable.

Section 250 would subject the new corporation to the provisions of treaties with the Republic of Panama, the Canal Zone Code, and other acts of Congress applicable to the present corporation.

[fol. 78] Section 251 authorizes and directs the new corporation to take over the assets and assume the liabilities of the present corporation as of July 1, 1948. It provides for the dissolution of the old corporation and the vesting of property rights in the new corporation.

Section 252 requires the corporation to reimburse other agencies for payments made for the benefit of the corporation.

Section 253 requires the corporation annually to appraise its necessary working capital requirements together with reasonable foreseeable requirements for authorized plant replacement and expansion, and to pay into the Treasury as dividends the amount in excess of those requirements. The dividends are to be treated by the Treasury as miscellaneous receipts. On the books of the company the dividends are to be applied against direct capital contributions

in determining the base for interest payments to the Treasury of the United States under section 246.

Section 254 authorizes the corporation to borrow for limited periods of time for authorized purposes of the corporation from a fund to be established and maintained in the Treasury of the United States. The sums of money borrowed from this fund cannot exceed a total of $10,000,000 outstanding at any one time and must be repaid and redeposited into the fund. This fund is to be established by the deposit of funds of the present corporation. It will enable the corporation to function effectively without the necessity of large funded reserves.

Section 255 reserves the right to alter, amend, or repeal the provisions of this legislation.

Section 256 is the separability clause in one of the forms commonly used for such purposes.

This bill as reported is approved by the General Accounting Office, the Bureau of the Budget, and the Panama Railroad Company, and is concurred in by the Governor of the Panama Canal and the Secretary of the Army.

For the information of the Congress there is also set forth the provisions of section 304 (b) of the Government Corporation Control Act, approved December 6, 1945:

Section 304 (b) of the Government Corporation Control Act, Approved December 6, 1945

No wholly owned Government corporation created by or under the laws of any State, Territory, or possession of the United States or any political subdivision thereof, or under the laws of the District of Columbia, shall continue after June 30, 1948, as an agency or instrumentality of the United States, and no funds of, or obtained from, the United States or any agency thereof, including corporations, shall be invested in or employed by any such corporation after that date, except for purposes of liquidation.[2] The proper corporate authority of every such corporation shall take the necessary steps to institute dissolution or liquidation proceedings on or before that date: *Provided*, That prior thereto any such corporation may be reincorporated by Act of Congress for such purposes and term of existence and with such powers, privileges, and duties as authorized by

such Act, including the power to take over the assets and assume the liabilities of its respective predecessor corporation.

[fol. 79] EXHIBIT "C" TO MOTION

HOUSE OF REPRESENTATIVES

81st Congress, 2d Session — Document No. 460

PANAMA CANAL AND PANAMA RAILROAD COMPANY

Communication from the President of the United States Transmitting the Report and Recommendations of the Bureau of the Budget with Respect to the Organization and Operations of the Panama Canal and Panama Railroad Company, Pursuant to House Report No. 1304, Eighty-first Congress

February 1, 1950.—Referred to the Committee on Merchant Marine and Fisheries and ordered to be printed

The White House,
Washington, January 31, 1950.

Hon. Sam Rayburn,
Speaker of the House of Representatives.

DEAR MR. SPEAKER: I am transmitting herewith the report and recommendations of the Bureau of the Budget with respect to the organization and operations of the Panama Canal and Panama Railroad Company. The report was prepared pursuant to House Report No. 1304, Eighty-first Congess, first session.

The recommendations of the Bureau of the Budget have my approval except the recommendation with respect to the transfer of supervision of the Panma Canal from the Secretary of the Army to the Secretary of Commerce. I desire to give further study to that recommendation, particularly in connection with plans to carry out the proposals of the Commission on Organization of the Executive Branch of the Government which are now under consideration.

As preliminary steps to facilitate the recommended reorganization of the Panama Canal and the Panama Rail-

road Company I have today issued two Executive orders. The first delegates to the Governor of the Panama Canal authority to determine the internal organization of the Panama Canal. The second order transfers certain business operations from the Panama Canal to the Panama Railroad Company. These initial transfers will simplify and facilitate the early transfer to the Company of all business operations of the Panama Canal.

[fol. 80] While several of the recommendations can be implemented by Executive order, legislation is required to (1) authorize transfer of the Panama Canal to the Panama Railroad Company; (2) change the name of the Panama Railroad Company to Panama Canal Company; (3) authorize the Company's Board of Directors to establish toll rates, subject to the President's approval; (4) permit the Company to retain and utilize toll revenues; and (5) authorize appropriations to the Company to cover losses which might result from changes in economic conditions. I recommend the enactment of such legislation.

It is believed that implementation of the Bureau of the Budget's recommendations will result in a more logical grouping of functions, provide a sounder basis for determining toll rates and other charges, facilitate operations, and, in general, promote the more effective administration of the Panama Canal enterprise.

Very sincerely yours, Harry S. Truman.

Executive Office of the President
Bureau of the Budget, Washington 25, D. C.

Report to the President.

Subject: Organization of the Panama Canal and Panama Railroad Company.

Origin of Study

The act of August 24, 1937, amending the Panama Canal Act, authorizes the President to set Panama Canal tolls at a rate not to exceed $1 per ton for laden ships and at a lesser rate for ships in ballast. Shortly after the enactment of this legislation, the President set the rate at 90 cents a ton for laden ships.

For a number of years the Panama Canal has been con-

cerned by the failure of the revenues from tolls to meet greatly increased costs of operations. The question of increasing Canal revenues was discussed before the House Appropriations Committee in 1947 and on February 24, 1948, the committee recommended that the tolls charges should be raised to the statutory maximum. The Governor of the Panama Canal subsequently recommended to the President that tolls charges be increased to $1 per ton for laden ships. This recommendation was carried out by Presidential Proclamation No. 2775 of March 26, 1948, effective October 1, 1948. Six months' prior notice of an increase is required by law.

The issuance of the proclamation was met by vigorous protests from the shipping industry. As a result the Congress decided to review the whole question of tolls policy. House Resolution 44 (81st Cong., 1st sess.) authorized the Commitee on Merchant Marine and Fisheries or any duly authorized subcommittee thereof—

to make a full and complete analysis of the financial operation of the Panama Canal with particular reference to the proper accounting and allocation of costs attributable to—

(a) the transit of the Canal by commercial, governmental, and military vessels of the United States and foreign nations;

(b) military activities of the United States in and connected with the Canal Zone;

[fol. 81] (c) United States civil government; including, but not limited to, sanitation, public schools, playgrounds, hospitals, and so forth;

(d) business operations conducted under the supervision of the Governor of the Panama Canal by various business units of the Panama Canal and Panama Railroad Company;

and to recommend to the Congress concerning what elements of cost should be properly used in the future as the base of a policy to be followed in establishing and levying tolls for the use of the Panama Canal for transit purposes.

The President was requested to—

defer until after the submission of the committee's report any change in the tolls currently levied for use of the Panama Canal.

The effective date of the increase was postponed until April 1, 1949, and again, at the request of the committee, until September 1, 1949.

Pursuant to the authority conferred by House Resolution 44, a special subcommittee of the House Merchant Marine and Fisheries Committee to investigate Panama Canal tolls conducted a study and issued an interim report (H. Rept. No. 1304, 81st Cong., 1st sess.) on August 23, 1949. The subcommittee found that—

> the toll question is intimately linked to the administration, operation, and accounts of the Canal. The appropriate toll policy can hardly be decided upon and administered without business-type accounts, similar to those of public utilities, upon which to rely for basic financial and operating data. * * * It is believed to be impossible to arrive at any satisfactory conclusion until the Canal functions have been placed either within the Panama Railroad Company or in a separate corporation with an appropriate type of accounting which segregates defense measures from commercial capital costs and operating expenses on the basis of appropriate legislative allocation.

The subcommittee recommended:

1. That the President be requested to cause a study to be made of the organizational aspects of all phases of the Panama Canal; including the Panama Railroad, and that his recommendations of suitable changes be furnished to the Congress. Inasmuch as the problem has recently been considered by the General Accounting Office and the Bureau of the Budget, it is believed that this study may be concluded within the present calendar year, and in any event not later than January 31, 1950.

2. That in the meantime the pending Proclamation No. 2775 be withheld until a decision is reached as to the final organization of the Panama Canal.

In compliance with the subcommittee's recommendation, the effective date of the proclamation was postponed until April 1, 1950. The President directed the Director of the Bureau of the Budget by letter of August 25, 1949, to undertake the study requested by the subcommittee.

Organization of the Panama Canal and the Panama Railroad Company

The primary mission of the Panama Canal and related Government business enterprises in the Canal Zone is to operate and maintain a waterway by means of which vessels may make the transit from one ocean to another. The accomplishment of this mission involves three general types of activities:

(1) Operation, maintenance and protection of the Canal itself;

(2) Operation of various auxiliary business enterprises necessary to provide for the needs of shipping and Canal employees and essential to the efficient and economical operation of the Canal; and

(3) Administration of the government of the Canal Zone.

[fol. 82] Administration of these activities is the function of the Panama Canal and its business adjunct, the Panama Railroad Company, a wholly owned Government corporation.

The Panama Canal is responsible for the operation and maintenance of the Canal and the government, sanitation, and protection of the Canal and Canal Zone. Administration of the various auxiliary business enterprises is divided between the Panama Canal and the Panama Railroad Company. The 18 so-called "business divisions," the clubhouse division and the Bureau of Posts of the Panama Canal are responsible for mechanical, marine, and electrical-repair work, building construction and maintenance, quarters for employees, storehouses and ship chandlery, oil-handling facilities, gasoline stations, gravel plant, Sosa Hill quarry, Panama Canal press, motor transportation, municipal work, water system, electric-power system, theaters, restaurants, small retail stores and postal service. The Panama Railroad Company operates the trans-Isthmian railroad, a steamship line between New York and the Canal Zone, coaling plants, telephone system, receiving and forwarding agency, hotels, wholesale warehouses, cold storage plants, laundry, dairy, manufacturing plants, and retail stores.

The Panama Canal is at present an independent agency headed by a Governor appointed by the President by and

with the advice and consent of the Senate. Although the President has delegated general supervisory authority over the Panama Canal to the Secretary of the Army, the agency is not legally a part of the Department of the Army or the Department of Defense. In time of war in which the United States is engaged, or when in the opinion of the President war is imminent, the President is authorized to designate an officer of the Army to exercise exclusive authority and jurisdiction over the operation of the Canal and its adjuncts. The President took such action by issuing Executive Order No. 8232 on September 5, 1939. This order still remains in effect.

Management of the Panama Railroad Company is vested in a Board of Directors consisting of not less than 9 and not more than 13 persons selected by the President or such officer of the United States as he may designate as "stock holder." The Governor of the Panama Canal is ex officio a Director and President of the corporation. The Secretary of the Army has been designated by the President to act as "stockholder" and thus supervises both the Railroad Company and the Canal.

The Panama Canal and the Panama Railroad Company constitute a single administrative entity. The Governor, engineer of maintenance, and many of the heads of both staff and operating units act in a dual capacity as officials of the Canal and officers of the corporation.

Inflexibility of the Organization

The organization of the Panama Canal is characterized by a high degree of inflexibility, which has made more difficult adjustments dictated by the increased complexity of its operations and by changes in program emphasis or commercial conditions. The transition of the Canal from a vast construction project to a multi-million-dollar-business operation has not been reflected by any changes in its basic over-all organization which remains the same today as [fol. 83] it was when the Panama Canal was established 36 years ago as the successor to the Isthmian Canal Commission. The same is true of its internal organization which, with some minor modifications, conforms to the provisions of Executive Order No. 1885, issued by President Wilson in 1914.

There is no single cause of this inflexibility. It is the product of a combination of factors including geographical isolation from the United States, environment, monopoly character of the operations, and restrictions on the Governor's authority to reorganize. Some of these can be remedied or alleviated, but others are inherent in the Canal's location and mission.

The operations on the Isthmus are largely self-contained and have little direct contact with current conditions in the United States. Notwithstanding the development of rapid communications and modes of travel, employees of the Canal soon lose contact both with their friends and job opportunities in the States. If an employee is discharged, he and his family must leave the Zone within 30 days. He not only loses a job, but must leave his home and friends as well. This condition has tended to reduce normal turn-over and has constituted a serious obstacle to the recruitment of new personnel. Crystallization of tradition and the development of a general resistance to change are the inevitable consequences of isolation.

Treaty obligations as well as administrative and strategic considerations make it essential that all of the major business operations in the Canal Zone be conducted as Government monopolies. Consequently, competition cannot be relied upon as a stimulus to promote efficiency and progress. In a sense this is also true of the Canal's governmental activities for they are not readily comparable to like activities in the United States.

Despite the fact that the Governor is responsible for the efficient operation of the Canal, his authority to make such changes in internal organization as may be necessary to promote efficiency is limited. Executive Order No. 1885 prescribes in detail the organization of the Panama Canal and its adjuncts. A memorandum accompanying the Executive order earmarks many of the top administrative positions for various branches of the armed services, thus restricting the Governor's freedom in selecting his principal subordinates. The Governor's authority extends only to assigning duties to subunits within major departments and offices and transferring, with the approval of the President, specific duties from one department or office to another. At the present time any major reorganization would require either Presidential action or approval.

The necessity of adjusting a dynamic program to a static organization has meant that organization problems have been dealt with on a patchwork basis. While through the the years organizational relationships and duty assignments have been altered, yet titles and organizational groupings have not been modified to conform to actual practice and in many instances are misleading or meaningless.

Over the past several years the governors of the Panama Canal have been increasingly concerned by the failure of the existing organization to meet adequately present-day operating conditions and the complexities that have developed in the conduct of the Canal's business. Studies of the Canal's entire organization were initiated by Gov. F. K. Newcomer early in 1949 and plans for a general reorganization have reached an advanced stage.

[fol. 84] Complexity of Financial Administration

Management of the Panama Canal and its adjuncts is further complicated by the variety of policies and statutory requirements applicable to the financial operations of the various enterprises. The Panama Railroad Company, the Canal, the business divisions, the postal system and clubhouses, and the civil government of the Canal Zone are each administered under a somewhat different set of standards and regulations. Significant differences are found in sources and use of funds, accounting, and budgeting and audit procedures.

a. Sources and use of funds

The Panama Railroad Company is completely self-supporting. Its business activities are financed out of revenues, and the corporation is required to pay into the Treasury as dividends any amounts in excess of its necessary working capital requirements and its reasonably foreseeable requirements for plant replacement and expansion. The corporation has business-type flexibility with respect to its expenditures which are subject only to laws applicable to Government corporations.

The Panama Canal is also authorized to use receipts to finance its business operations, but is subject to two requirements not applicable to the Panama Railroad Company: (1) The aggregate net profit if any accruing from the con-

duct of such business operations shall annually be covered into the Treasury of the United States; (2) such receipts shall be subject to the provisions of law relating to public funds of the United States. The effect of the latter provision is to reduce flexibility and to subject the business operations of the Canal to all of the regulatory and prohibitory statutes applicable to governmental type programs.

The postal system, clubhouses, and transiting of ships through the Canal are handled differently than the other business operations. Expenses of operating the Canal Zone postal service are defrayed from its revenues, and such revenues are appropriated, without limitation as to time or amount, for that purpose. The clubhouses are completely self-supporting at the present time. Clubhouse funds fall in a special category and do not have the legal status of appropriated funds. Neither the postal service nor the clubhouses are required to pay dividends or net profits into the Treasury.

The Canal is not authorized to utilize its principal source of income, revenues from tolls. The statutes require that revenues from tolls and civil revenues shall be covered into the Treasury of the United States. The maintenance and operation of the Canal together with civil government, health, and sanitation are financed by funds appropriated by the Congress.

b. Accounts, budget and audit

As a wholly owned Government corporation, the Panama Railroad Company is in a position to conduct its operations in a businesslike manner. It is subject to the Government Corporation Control Act of 1945 and enjoys the benefit of the business-type budget, audit, and accounting procedures prescribed by that act. Its accounts are designed not only to furnish the types of basic data required by management in the conduct of a business, but also to reveal accurately the financial results of its operations. The General Accounting Office has found that "the accounts of the Panama [fol. 85] Railroad Company have been well maintained and supervised." The corporation submits annually a business-type budget for review by the President and the Congress, and its financial transactions are audited each year by the General Accounting Office "in accordance with the princi-

ples and procedures applicable to commercial corporate transactions."

On the other hand, the Panama Canal, as a noncorporate agency coming under the provisions of the Budget and Accounting Act of 1921, must conduct all of its business operations, except the clubhouses, in accordance with rules and procedures designed to control programs of a noncommercial character. Accounts are maintained in accordance with statutory rules and regulations and principles of appropriation and fund accounting prescribed for governmental bodies. However, the business nature of many of the activities has necessitated adaptations in the accounting system to meet some of the basic requirements of a business operation. The result of existing laws and regulations is a hybrid governmental-commercial accounting system which is far from satisfactory. The General Accounting Office has criticized the accounts produced under this hybrid system as, in most cases, falling—

far short of the kind of factual determination and presentation of revenues, costs and expenses, and net profits (or losses) necessary for accurate reporting and as an effective tool for management control.

Similarly, the governmental-type budget submitted by the Panama Canal is not designed to furnish adequately the types of basic data essential to the satisfactory evaluation and control of a business operation. Furthermore, there is no independent commercial-type audit of the accounts of the Panama Canal. Disbursement vouchers are submitted by the Canal to the General Accounting Office in Washington and are audited for the purpose of checking the legality of expenditures. The audit by the General Accounting Office on the Isthmus is primarily restricted to an examination of receipts. Neither the voucher audit in Washington nor the audit of receipts on the Isthmus is designed to disclose fully the financial condition of the Canal and the financial results of its operations.

The net effect of current laws and procedures is to require that the Panama Railroad Company and the Panama Canal, two integral parts of a single enterprise, be operated as if one were strictly business and the other strictly governmental. Yet there would appear to be no valid basis for

distinguishing between a business operation conducted by the Panama Railroad and a comparable operation under the Panama Canal. It would be extremely difficult, for example, to discover a significant difference between a Panama Canal storehouse and a Panama Railroad commissary, both of which are engaged in the business of selling commodities. Business-type accounts, budget, audit, and financial flexibility are essential to the successful conduct of the affairs of the Panama Railroad Company and certainly are no less desirable in the case of the Panama Canal's business operations.

The way has now been opened to clarify the present anomalous situation. Public Law 808 (80th Cong.) authorizes the Panama Railroad Company to undertake any of the business operations now performed by the Canal, except operation of the Canal itself, and Public Law 223 (81st Cong., 1st sess.) authorizes the President to transfer certain or all of such activities to the corporation. Pursu- [fol. 86] ant to the direction of the President, Governor Newcomer submitted on November 18, 1949, recommendations for certain initial transfers. Additional legislation would be required to authorize the President to transfer the Canal operation to the corporation.

Tolls Policy

The treatment of the Panama Railroad Company and the Panama Canal as separate entities for financial and accounting purposes has not provided a clear basis for a sound tolls policy. Although the 1937 Special Committee on Panama Canal Tolls and Vessel Measurement recommended that in considering expenses and revenues the Canal and its adjuncts, including the corporation, should be regarded as a single enterprise, this practice has not been followed.

Under the existing formula, revenues from tolls, together with profits from the Canal's business operations and miscellaneous revenues from licenses, fines, etc., are expected to produce an amount sufficient to cover operating expenses of the Panama Canal (including civil government, health, and sanitation), and a 3-percent return on the capital investment. Neither the revenues nor the expenses of the corporation are included in the tolls base.

Consequently the Canal would now automatically lose the benefit of the profits of any business activity transferred from it to the corporation. This fact has naturally led to opposition by the shipping industry to any such transfers.

No uniform pattern has been established for allocating to the corporation its share of the cost of civil government, health, and sanitation. The corporation is required to pay for hospitalization of its employees (but not out-patient care and dispensary service), garbage collection, police and fire protection of its own facilities, but it contributes nothing toward the upkeep of municipal police and fire portection, the Canal Zone school system, cemeteries, streets, highways, and sewers. The cost of the latter services is borne entirely by the Panama Canal. The corporation does bear its full share of the costs of overhead administration, such as the Governor's office, accounting department, etc.

The most controversial aspects of tolls policy are (1) the interest charge on the capital investment; and (2) the question of whether any of the costs of constructing, operating, and maintaining the Canal should be allocated to national defense.

The principal that Federal business enterprises should pay a rate of return on the Government's investment equal to the cost of the money to the Treasury is now well settled. The President recommended in his 1948 budget message that "Corporations should be required to reimburse the Treasury for the full cost of the money advanced to the corporation." There is no reason why the Panama Canal and its adjuncts should be exempted from payment of interest since they are essentially Federal business enterprises. However, at current average long-term rates the Panama Canal would be required to pay interest at the rate of approximately 2.3 rather than 3 percent.

Whether any part of the capital costs of the Canal should be allocated to national defense presents a problem to which there is no positive answer. The Canal admittedly does serve a dual purpose—defense and commerce. However, [fol. 87] any attempt to establish which purpose was primary at the time the Canal was built would be an utterly fruitless undertaking. An equal number of statements on

either side can be found, often by the same individual, to support whatever conclusion one wants to reach.

Studies made by the Bureau of Efficiency in 1931 and by the special committee in 1937 determined that no major part of the capital costs of the Panama Canal should be allocated to national defense. The only additional feature of the Canal which might not have been included if it had been constructed exclusively for commercial use is the increase in the width of the locks from 100 to 110 feet. Actually the additional width has been an important factor in facilitating the approach to, and handling of commercial vessels in, the locks. There would appear to be no significant added costs in the construction of the Canal attributable solely to national defense.

The subsidy to national defense comes not from a failure to allocate capital costs but from the fact that military and other Government vessels do not pay tolls. While a record is maintained of such free transits, no allowance is made for them in the tolls base. This policy stems from an interpretation of an Attorney General's opinion in 1915. That interpretation need not be controlling for, while the Attorney General did hold that free transits would not constitute a treaty violation, he did not rule that it would be illegal either to require the payment of tolls by Government vessels, or to credit them in the tolls base.

The cost of transiting a military vessel through the Canal is just as much a national-defense cost as the cost of operating the vessel itself. It is in no sense an essential part of the cost of operating and maintaining the Canal. Yet the cost of free transits is now included with the other costs which the commercial user of the Canal is expected to meet by the payment of tolls. While during the period from 1921 to 1939 free transits have averaged 4.1 percent of total Canal tolls, during what may be considered the war years (1940-45) the volume of free transits averaged 26.2 percent, and in 1945 reached 64.5 percent. The total amount of free tolls from 1921 to 1949 amounted to $64,194,574.

The military pay for most of the other services which they obtain from the Panama Canal, such as hospitalization, water, electricity, garbage collection, etc. The only major item of this type for which the military do not pay is the school facilities for children of military personnel and

civilian personnel employed by the military. Over 45 percent of the school poulation of the United States rate—schools at the present time consists of children whose parents are members of the armed forces or employed by the Army, Navy, or Air Force.

The Coast Guard reimburses the Panama Canal for the maintenance of two of the most distant offshore lighthouses, but the Canal meets the cost of the other offshore lighthouses.

To look at the other side of the picture, the Canal receives certain services from the military without reimbursement. These consist principally of Army and Navy personnel assigned to duty with the Canal. Salaries paid by the military to such employees of the Canal amount to approximately $430,000 per annum.

[fol. 88] Supervision of the Panama Canal and Panama Railroad Company

Supervision of the Panama Canal and the Panama Railroad Company has been vested from the very beginning in the Secretary of War and his successor, the Secretary of the Army. President Theodore Roosevelt's letter of May 9, 1904, cites two principal reasons for requesting the Secretary of War to act as his representative in supervising the construction of the Canal and the government of the Canal Zone:

(1) the War Department is the Department which has always supervised the construction of the great civil works for improving the rivers and harbors of the country and the extended military works of public defense; (2) the War Department has from time to time been charged with the supervision of the government of all of the island possessions of the United States, and continues to supervise the Government of the Philippine Islands.

Neither of these reasons would apply with equal force today. Construction has become incidental to the maintenance and operation of the Canal. The War Department is no longer the agency which supervises the government of our island possessions. Reorganization Plan No. II of 1939 transferred all remaining functions of the War De-

partment's old Bureau of Insular Affairs to the Department of the Interior.

Excellent reasons existed for not considering any change with respect to the Panama Canal at the time when the War Department was relieved of its remaining responsibilities over Territories and possessions in 1939. It was in September of that year that the President found it necessary [fol. 89] to invoke the provisions of the Panama Canal Act by placing the Canal under the direct command of the Army. To have placed the Canal under any official other than the Secretary of War in 1939 and the ensuing war years would have been illogical and resulted in a divided command.

When Executive Order No. 8232 is rescinded, however, the organizational status of the Panama Canal and the Panama Railroad Company should be reappraised. The intent of the Panama Canal Act that in peacetime the Canal and its adjuncts should be under civilian control is unmistakable. The Canal itself, which has been aptly described as a great international public utility, is fundamentally a commercial waterway for international commerce. Operation of a vast commercial enterprise such as the Canal and its adjuncts and the civil government of the Canal Zone is not necessary for the performance of the basic mission of the Department of Defense.

At the policy level the programs of the Panama Canal and the Panama Railroad Company have their most significant impact in the transportation area. Actions taken by the Canal may vitally affect not only world trade and shipping but also intercoastal trade and transcontinental railroads. The question of tolls rates, for example, raises important issues which should be reviewed in the light of the objectives of national transportation policy. Neither the Secretary of Defense nor the Secretary of the Army has at the present the departmental responsibility or the staff resources to deal adequately with policy issues of this character. Military-staff channels are not and should not be used for this purpose. In the absence of other staff facilities, the Secretary of the Army has been compelled to rely almost exclusively on his administrative assistant, who has numerous other important duties, and the Washington Office of the Panama Canal for assistance on Panama Canal matters.

Establishment of a special Panama Canal staff in either the Office of the Secretary of Defense or the Secretary of the Army would offer only a partial solution to the problem and might well further complicate coordination of transportation policy. The Commission on Organization of the Executive Branch of the Government recommended that—

there be established in the Department of Commerce a grouping of all major non-regulatory transportation activities of the Federal Government.

The Panama Canal would clearly come under the Commission's definition of a "transportation activity." Since the Secretary of Commerce is to be charged with coordination of transportation policy, it would be an entirely logical step to transfer to him supervisory authority over the Canal and its adjuncts.

The working out of a satisfactory relationship between the Canal and the armed forces on the Isthmus does not require that they report to the same department head. A clear-cut separation of civilian and military functions has already been accomplished in such highly strategic areas as Guam and the American zone of Germany. In some respects a separation would simplify the solution of differences between the two agencies. The Governor under existing arrangements operates at a serious disadvantage when he attempts to persuade the Secretary of the Army to overrule his military advisers. Often the best he can hope for is no action. Some of these questions could undoubtedly be settled more expeditiously by across-the-board [fol. 90] discussions between the Secretary of Commerce and the Secretary of Defense. It would only be on rare occasions that unresolved issues would have to be taken to the President.

Suggestions that the Canal be included in a Department of Overseas Affairs fail to recognize the unique status of the Canal and the Canal Zone. There are significant differences between the Canal Zone and other Territories and possessions. The Canal Zone is unique both as to the purposes for which it was acquired and is maintained by the United States and its status under governing treaties and laws. It is essentially a United States Government reservation devoted to the purposes of the maintenance, oper-

ation, sanitation, and protection of the Panama Canal and its auxiliary works.

[fol. 91] Recommendations

The record of achievement of the Panama Canal both in peace and in war is one in which the Nation may well take pride. This record can be maintained and surpassed, however, only by modernizing or replacing obsolete organizational machinery. It is believed that implementation of the following recommendations will result in a more logical grouping of functions, provide a sounder basis for determining toll rates and other charges, facilitate operations, and, in general, promote the more effective administration of the Panama Canal enterprise.

1. It is recommended that all of the functions of the Panama Canal, except those relating to civil government, health and sanitation, be transferred to the Panama Railroad Company and the Company's name changed to the Panama Canal Company; the name, the Panama Canal, should be changed to Canal Zone government.

The Commission on Organization of the Executive Branch of the Government recommended that—

straight-line business activities be incorporated so as to secure greater flexibility in management and simpler accounting, budgeting, and audit methods.

Transfer of the Panama Canal business operations and clubhouses, together with the Canal itself, to the Panama Railroad Company is wholly consistent with the objective set by the Commission.

Within recent years it has been increasingly recognized that financial controls generally applicable to government-type programs, such as civil government, health and sanitation, cannot satisfactorily be employed in the case of programs which are essentially of a business nature. This is reflected by the enactment in 1945 of the Government Corporation Control Act, which provides for new types of controls, such as the business-type budget and commercial-

type audit, specially designed to meet the needs of programs of a business character.

The grouping together of all business activities in the Panama Canal Company and all governmental activities in the Canal Zone government will insure that each will operate under the appropriate type of controls. The attempt to operate the business activities of the Panama Canal under procedures, accounting methods, and controls [fol. 92] devised for nonbusiness programs is a major source of current complexities in financial administration.

The operation and maintenance of the Canal itself is no less of a business operation than the other activities now defined by the Panama Canal as "business operations." It is revenue-producing, expected to be self-sustaining, and requires considerable operating flexibility. As the 1937 special committee noted in its report:

> the Panama Canal and its auxiliary adjuncts constitute a business enterprise that may be properly made self-supporting.

In accordance with the provisions of the Panama Railroad Company charter (Public Law 808, 80th Cong.), the Government investment in the Panama Canal Company, subject to interest, would consist of the appraised value of the net assets transferred to the Company from the Panama Canal, less repayments as dividends or otherwise by the Panama Railroad Company in excess of the original Government investment therein. The investment would be increased by any subsequent additional investments of Government funds or other assets, or reduced by repayments to the Treasury and extraordinary expenditures and losses incurred through national policy and not related to the Company's operations. The Company would be required to pay interest to the extent of its ability on the net direct investment in the Company—

> at a rate or rates determined by the Secretary of the Treasury as required to reimburse the Treasury for its cost.

The Company should reimburse other Government agencies for goods and services it receives, including the payment of salaries of military personnel, and should be

compensated for any services it furnishes to other agencies. Only in this way can a completely accurate picture be obtained of the financial results of its operations. Sales or services between divisions of the Company, or between the Company and the Canal Zone government, should be charged as nearly as possible at the cost of producing such goods or services, excluding interest and the Company's share of the cost of civil government. Sales and services to all others, including Government agencies, should be at prices over cost which may reasonably be expected to cover, in the aggregate, the interest on the Government's investment and the Company's share of the expense of civil government and related activities. Free transits of United States Government vessels would be eliminated.

Inasmuch as the Company will not pay taxes, which it would be required to do if it were a private corporation, it should be expected in lieu of taxes to bear the net expense of civil government, health, and sanitation. This expense would be assessed against the total enterprise, rather than exclusively against the tolls as under the existing system. One method of distributing such costs among various elements of the enterprise would be on the basis of gross revenues. This method has the merit of simplicity and the merit, also, of recognizing changes in the going-concern value of the enterprises.

The Company would operate primarily from revenues and should be authorized to utilize all of its revenues, including revenues from tolls, in the conduct of its business. The present practice of paying tolls into miscellaneous receipts is not necessary to provide adequate control over the use of such funds. Adequate control can be secured [fol. 93] through the business-type budget, which all corporations must submit annually to the President and the Congress, and the commercial-type audit by the General Accounting Office. To take care of any sudden drop in business due to changes in economic conditions, appropriations to the corporation to cover losses should be authorized.

The Canal Zone government, as the agency charged with exclusively governmental functions, should be financed by an annual appropriation from the Congress. However, the costs of operation in the long run should be recovered

from (1) charges for services, such as school tuition, license fees, fines, etc.; (2) charges to the armed forces for facilities used by their personnel, primarily schools and hospitals; and (3) payment by the Company of the remaining balance. Since the Canal Zone government would be a noncommercial agency, no payment of interest on the Government's investment should be required, but the costs should include depreciation, and the reimbursement of other Government agencies for expenditures made on its behalf. All collections by the Canal Zone government, including payments by the Company, should be covered into the Treasury as miscellaneous receipts. The Canal Zone should adopt accrual methods of budgeting, accounting, and reporting so that its financial statement will be consistent with those of the Company.

Consideration was given to the merger of all of the activities of the Panama Canal and the Panama Railroad company in a single corporation. While such an arrangement would have the virtue of simplicity, it would continue the present intermingling of business and governmental functions. More important perhaps is the fact that the Governor has certain statutory functions as the representative of the President of the United States on the Isthmus which it would be entirely inappropriate to vest in a corporation president serving under a board of directors. Examples of such functions include dealings with the Republic of Panama, the issuance of exequators to foreign consuls, the extradition of fugitives from justice, the granting of pardons and reprieves, the issuance of various regulations and ordinances and similar functions normally vested in a chief of state. Under the proposed reorganization, the Governor would continue to act in a dual capacity as Governor and president of the corporation.

It was also found that there was no necessity of creating a new corporation. Public Law 808 (80th Cong.), the charter of the Panama Railroad Company, affords a satisfactory instrument for performing the additional functions to be conferred upon the corporation. Amendments to this act will re required, however, to authorize the corporation to operate and maintain the Canal and utilize revenues from tolls. Additional amendents will be needed to au-

thorize appropriations to cover losses and to change the corporation's name. The name Panama Railroad Company has historical value but it has long ceased to be descriptive of the corporation's many varied activities. It is also proposed that the name the Panama Canal be changed to Canal Zone government.

In summary, it is believed that the proposed reorganization will—

(a) For the first time present a complete picture of the Government's investment in the Panama Canal enterprise and the results of its operations;

[fol. 94] (b) Make possible more efficient operation of the various commercial enterprises by the introduction of business-type budgeting, accounting, and reporting methods together with essential operating flexibility;

(c) Provide a more equitable basis for levying tolls and other charges through proper allocation of the costs of operating and maintaining the Canal and its related enterprises.

Satisfactory accomplishment of such a reorganization will take time and make mandatory the strengthening of staff facilities now available to the Governor. Approximately 1 year would be required to convert the existing organization to the new basis.

2. It is recommended that authority to determine the internal organization of the Panama Canal be delegated to the Governor of the Panama Canal.

The Commission on Organization of the Executive Branch of the Government recommended that a department head "should be given authority to determine the organization within his department." Much of the inflexibility of the present Panama Canal organization stems from the fact that the Governor does not possess such authority. Executive Order No. 1885, together with the accompanying memorandum of the President, should be rescinded and the authority to determine internal organization delegated to the Governor.

3. It is recommended that the Board of Directors of the Panama Canal Company be authorized to establish tolls rates, subject to the President's approval.

The present basis of establishing tolls rates does not lend itself to the ready adjustment of rates, either up or down, to reflect increases or decreases in costs or changes in commercial conditions. While the President is authorized to prescribe and from time to time change the tolls to be levied for use of the Panama Canal, he must give 6 months' notice of such changes by proclamation and cannot raise the rate above $1 per net vessel-ton for laden vessels. It is significant that the tolls rates have not been changed under this formula since 1938.

Provided that there is agreement as to the formula for establishing the tolls rates and adequate business-type accounts and financial reporting, the actual setting of the tolls rate becomes almost a ministerial function which could well be delegated to the corporation's board of directors. However, since the tolls rate may have an effect on national transportation policy, review and approval of the rate by the President is essential.

While the tolls rate should not be changed on a year-to-year basis since 1 year's experience is insufficient to reflect accurately long-range trends, the rate should be adjusted periodically as changes take place in the factors that determine the charges that should be made for the use of the Canal. As the 1937 special committee expressed it:

Economic and commercial conditions are not static. The Panama Canal is a facility for the service of interoceanic commerce. The charges for the service should receive such adjustments from time to time as will keep the charges in harmony with the needs of the Canal and the requirements that must be met in making the Canal the servant and assistant of international intercourse.

[fol. 95] 4. It is recommended that responsibilty for supervision of the Panama Canal and the Panama Railroad Company be transferred from the Secretary of the Army to the Secretary of Commerce

The Panama Canal and the Panama Railroad Company should be included with the other major nonregulatory

transportation agencies which the Commission on Organization of the Executive Branch of the Government has recommended be grouped together under the Secretary of Commerce. It is essential that Panama Canal policies be coordinated with the objectives of national transportation policy and such coordination can best be achieved through supervision by the Secretary of Commerce. Staff facilities already exist in the Department of Commerce which could be developed to furnish necessary assistance to the Secretary of Commerce in fulfilling his supervisory responsibility with respect to the Panama Canal enterprise. Such facilities do not now exist in the Department of the Army and the Department of Defense and military staff cannot satisfactorily be employed for this purpose.

In addition, the Department of Commerce is constantly engaged in studying business-management problems and is consequently in an excellent position to provide valuable assistance to the corporation in its conduct of the many varied commercial enterprises on the Isthmus.

The historical reasons for placing the Panama Canal under the Secretary of War's supervision no longer apply. The construction stage of the Canal's operation has long since been completed, and the Department of the Army is no longer the agency charged with the responsibility for government of Territories and island possessions.

In time of war or when war is threatened, the Panama Canal could be placed under military supervision and control as is now provided by the Panama Canal Act.

The timing of the transfer of supervisory responsibility to the Secretary of Commerce is dependent upon what action is taken with respect to Executive Order No. 8232, which places the Canal and its adjuncts under military control.

5. It is recommended that early consideration be given to the revocation of Executive Order No. 8232

Assessment of military requirements with respect to the defense of the Canal is obviously beyond the scope of the present study. Continuance in effect of Executive Order No. 8232 would appear, however, to be in conflict with spe-

cific provisions of the Panama Canal Act, and justification for its continuance should be explored promptly.

Frank Pace, Jr., Director.

[fol. 96] EXHIBIT "D" TO MOTION

MAINTENANCE AND OPERATION OF THE PANAMA CANAL

Hearing Before a Subcommittee of the Committee on Armed Services, United States Senate, Eighty-first Congress, Second Session on H. R. 8677

An Act to Authorize and Provide for the Maintenance and Operation of the Panama Canal by the Present Corporate Adjunct of the Panama Canal, as Renamed; to Reconstitute the Agency Charged with the Civil Government of the Canal Zone, and for Other Purposes

September 1, 1950

Printed for the use of the Committee on Armed Services

[fol. 97] MAINTENANCE AND OPERATION OF THE PANAMA CANAL

Friday, September 1, 1950

United States Senate, Subcommittee of the Committee on Armed Services, Washington, D. C.

The subcommittee met, pursuant to call, at 1:40 p. m., in room 212, Senate Office Building, Senator Harry Flood Byrd (comprising a subcommittee of one) presiding.

Present: Senator Byrd.

Also present: Justice M. Chambers of the committee staff.

Senator Byrd. The meeting will come to order.

This is a subcommittee appointed to consider H. R. 8677, a copy of which is placed in the record at this time.

[fol. 98] Senator Byrd. As I understand it, this bill is primarily designed to improve the cost-accounting procedures of the Panama Canal for the purpose of providing a more accurate method of determining and adjusting tolls.

I notice Congressman Fugate, of Virginia, is here in the room. Does Congressman Fugate desire to make a statement?

Mr. Fugate. I do not desire to make a statement. There are others here who are prepared and will make a statement on the bill.

Senator Byrd. I know of your great interest in this.

Mr. Seidman, of the Bureau of the Budget, will be the first witness.

Statement of Harold Seidman, Accompanied by Russell Roane, Representing the Bureau of the Budget

Mr. Seidman. Mr. Chairman, the President on January 31, 1950, transmitted to the Congress a report of the Bureau of the Budget and his recommendations with respect to the organization and operations of the Panama Canal and the Panama Railroad Company. The report and recommendations were prepared pursuant to House Report No. 1304, [fol. 99] Eighty-first Congress, first session, which requested the President—

to cause a study to be made of the organizational aspects of all phases of the Panama Canal, including the Panama Railroad, and that his recommendations of suitable changes be furnished to the Congress.

The President's recommendations may be briefly summarized as follows:

1. All of the business operations of the agency known as the Panama Canal, including the operation and maintenance of the waterway, should be transferred to the Panama Railroad Company whose name should be changed to "Panama Canal Company."

2. The Panama Canal, under the new name of "Canal Zone Government," should continue to administer functions which are basically of a governmental nature such as health, sanitation, education, police and fire protection, etc. The Governor, as under present arrangements, would serve

in a dual capacity as both the head of the Canal Zone Government and President of the Panama Canal Company.

3. The proposed Panama Canal Company should reimburse other Government agencies for goods and services it receives, and be compensated or receive credit for any services it renders to other agencies, including the cost of transiting military and Government vessels through the Canal.

4. The Board of Directors of the proposed Panama Canal Company should be authorized to establish toll rates, subject to the President's approval.

H.R. 8677, as approved by the House of Representatives, is fully in accord with the President's recommendations, except for amendments to section 14 providing that (1) the rate of tolls on laden vessels shall not exceed $1 per net vessel ton; and (2) capital investment for interest purposes shall not include any interest during construction.

The Commission on Organization of the Executive Branch of the Government recommended that—

straight-line business activities be incorporated so as to secure greater flexibility in management and simpler accounting, budgeting, and audit methods.

By providing for the transfer of the Panama Canal business operations, together with the Canal itself, to the Panama Canal Company, H. R. 8677 is wholly consistent with the objective set by the Commission.

Within recent years it has been increasingly recognized that financial controls generally applicable to Government-type programs, such as civil government, health and sanitation, cannot satisfactorily be employed in the case of programs which are essentially of a business nature. This is reflected by the enactment in 1945 of the Government Corporation Control Act, of which Senator Byrd was the coauthor, which provides for new types of controls, such as the business-type budget and commercial-type audit, specially designed to meet the needs of a programs of a business character.

I might add that Congress within the week again recognized the necessity of distinguishing between financial controls of business programs and those over the ordinary

governmental spending type of program by excluding corporations from the jurisdiction of the Budget and Accounting Procedures Act of 1950, so that they will continue to be under the Government Corporation Control Act. [fol. 100] The grouping together of all business activities in the Panama Canal Company and all governmental activities in the Canal Zone government will insure that each will operate under the appropriate type of controls. The attempt to operate the business activities of the Panama Canal under procedures, accounting methods, and controls devised for nonbusiness programs is a major source of current complexities in financial administration.

The result of existing laws and regulations is a hybrid governmental-commercial accounting system which is far from satisfactory. The General Accounting Office has criticized the accounts produced under this hybrid system, as, in most cases, falling

far short of the kind of factual determination and presentation of revenues, costs and expenses, and net profits (or losses) necessary for accurate reporting and as an effective tool for management control.

The organizational arrangements contemplated by H. R. 8677 have already been approved, in large measure, by the Congress. Public Law 808 (80th Cong.) authorized the Panama Railroad Company to undertake any of the business operations now performed by the Panama Canal, except operation of the Canal itself, and Public Law 223 (81st Cong.) authorized the President to transfer certain or all of such activities to the Corporation. Several transfers have been made pursuant to this authority.

The record of the Appropriations Committee on the 1951 supplemental appropriation bill recommends that all of the housing activities of the Canal Zone be transferred to the Company.

The operation of the waterway is certainly no less of a business operation than those activities which the Congress has already authorized the President to transfer to the Corporation. It is revenue-producing, expected to be self-sustaining, and requires considerable operating flexibility. The transfer of the Canal to the Panama Canal Company, in accordance with the provisions of the present bill, is a

logical sequel to the transfers authorized by the earlier enactments.

The Panama Canal Company, like the present Panama Railroad Company, would be expected to operate primarily from its revenues and would be authorized to utilize all of its revenues in the conduct of its business. The present practice of paying tolls into miscellaneous receipts is not necessary to provide adequate control over the use of such funds. Adequate control can be secured through the business-type budget, which all corporations must submit annually to the President and the Congress, and the commercial-type audit by the General Accounting Office. The commercial-type audit will have the added advantage of making available to the Congress and the public for the first time a complete picture of the Government's investment in the Panama Canal enterprise and the results of its operations.

In addition to carrying out the President's recommendations with respect to organization, H. R. 8677 makes a number of important changes both in the procedures followed in prescribing tolls and in the formula employed in determining toll rates. The act of August 24, 1937, amending the Panama Canal Act, authorizes the President to set Panama Canal tolls at a rate not to exceed $1 per ton for laden ships. Six months' prior notice of an increase is required. No formula is established by the 1937 act to guide the President in adjusting the toll rates.

[fol. 101] H. R. 8677 provides that the Panama Canal Company shall prescribe the toll rates in accordance with a formula established in section 14 of the bill, subject to the President's approval. The Company, as under present law, would be required to give 6 months' prior notice of any proposed changes in rates, and, in addition, to conduct a public hearing on the proposed changes.

If there is agreement as to the formula for establishing the toll rates and adequate business-type accounts and financial reporting, there is no sound reason for not delegating the rate-making function to the Company's Board of Directors, as has been done in the case of other Government corporations, such as TVA, which set the rates to be charged for their services.

My recollection is in the testimony before the House committee there was pretty general agreement, both by industry and Government, as to the fairness of the formula set forth in the bill.

There are two important safeguards provided in the bill. The first is the requirement for a public hearing and the second for Presidential approval. Since tolls may have an effect on national transportation policy, review and approval of the rate by the President is believed essential. The Congress will, of course, have an opportunity to examine tolls policy in connection with its review of the business-type budget to be submitted annually by the Company.

Under the existing formula, revenues from tolls, together with profits from the Canal's business operations and miscellaneous civil revenues, are supposed to produce an amount sufficient to cover:

1. A 3-percent return on a capital investment of approximately $534,000,000 in the Panama Canal, including the investment in civil government, health and sanitation facilities. (This is a book figure and interest is not actually paid to the Treasury.)
2. The costs of operating and maintaining the Canal.
3. The net cost of civil government, health, and sanitation, including the cost of school facilities provided for children of military personnel and personnel employed by the military.
4. The cost of transiting military and Government vessels through the Canal.

The objective of the present formula has not been achieved in practice and the Canal accounts reflect substantial losses.

I think that has been so almost since the time this formula has been followed.

If the Canal were to be made self-sustaining on this basis, tolls would have to be increased to at least $1.40 a ton.

Several basic changes are made in this formula by H. R. 8677, considered in connection with Public Law 808, which was the charter of the Panama Railroad Company. This act is primarily an amendment to the Panama Railroad

charter. Under the new formula, revenues from tolls would be expected to cover:

1. Interest at the "going" rate (approximately 2.3 percent at the present time) on the capital investment in the Panama Canal, excluding the amount of any investment in national defense and civil government facilities and extraordinary expenditures or losses incurred through national policy and not related to the Company's operations. The Company would be required actually to pay interest to the Treasury.

[fol. 102] There would be offset against the amount of the investment subject to interest a proportionate share of the dividends which have been paid into the Treasury by the Panama Railroad Company. These amount to approximately $38,000,000. I think that figure is a little high. That is now provided for under existing law. Under the House amendment, there would also be excluded from the investment approximately $129,000,000, representing interest during the construction period.

2. The costs of operating and maintaining the Canal—that is the same in both formulas.

3. Approximately 50 percent of the net costs of civil government, health and sanitation. The remainder of these costs would be borne by the other corporate divisions such as the railroads, hotels, harbor terminals, steamship lines, utilities, commissaries, etc., out of revenues derived from the sale of goods and services.

It is believed that the amendment to section 14 (b) providing that the rate of tolls on laden vessels shall not exceed $1 per net vessel-ton is completely inconsistent with the objective of placing the Canal on a self-sustaining basis and, in effect, negates the preceding part of the subsection requiring that—

tolls shall be prescribed at a rate or rates calculated to cover, as nearly as practicable, all costs of maintaining and operating the Panama Canal.

The Bureau of the Budget recommends that the amendment establishing a ceiling on tolls be deleted.

The House also added a new subsection (c) to section 14 providing that—

capital investment for interest purposes shall not include any interest during construction.

The report of the House committee points out that interest during construction was not included in the Canal accounts until 1932 and that at the present time the Tennessee Valley Authority does not include interest during construction in its capital accounts. In further explanation of the amendment, the report states:

Such exclusion is recommended not only because of precedent but as a just and reasonable recognition of the defense value of the Canal, and as an offset against operations which have been conducted and which, to some extent, will be conducted in the future without reimbursement, for the Military Establishment or others in the interest of the United States.

If it is the determination of the Congress that exclusion of interest during construction from the tolls base represents—

a just and reasonable recognition of the defense value of the Canal—

and a fair offset against nonreimbursable services, the Bureau of the Budget has no objection to the amendment.

The practical effect of the above amendment is to reduce the toll rate approximately 10 cents a ton. If interest during construction were included in the investment base, the toll rate would probably have to be set at approximately $1.05 a ton—and I want to make it clear it is difficult to arrive at a correct estimate. One of the purposes of the legislation is to provide an accounting system which will provide the necessary information in order to comply with the requirements set forth in the bill.

[fol. 163] It is sincerely believed that enactment of H. R. 8677 is essential to bring about a more logical grouping of the functions now administered by the Panama Canal and Panama Railroad Company, to provide a more equitable basis for determining toll rates and other charges, to facilitate operations, and, in general, to promote the more effective administration of the Panama Canal enterprise.

I think the representative of the Department of the Army will make a recommendation, in which we concur, that section 7 of the original House bill be restored, which is merely a perfecting amendment dealing with claims for damages against the company.

Senator Byrd. Mr. Felix Larkin, who is general counsel of the Department of Defense, is here, and we will hear from him at this time. Mr. Seidman, will you please remain, if you can.

Statement of Felix Larkin, General Counsel, Department of Defense

Mr. Larkin. Mr. Chairman, I would just like to register for the record that the bill before you was transmitted to the Congress by Secretary Johnson in May, as an approved item on the legislative program of the Department of Defense, so that the Department of Defense is in effect sponsoring this bill.

Senator Byrd. You approve of the bill as it passed the House?

Mr. Larkin. We do, except for the $1 toll. We are not in accord with the limitation of the $1 toll. We are in accord with the Bureau of the Budget's position on that.

Senator Byrd. The Budget had two exceptions, I think the $1 toll and the capital investment for interest purposes shall not include interest during time of construction.

Mr. Larkin. That latter was deleted by the House, as I recall it, from the bill. We have no objection.

Senator Byrd. You stated in your statement that you approved it, excepting——

Mr. Seidman. It was approved as part of the President's program.

Mr. Larkin. Under the legislative procedures within the Department of Defense, the Department of the Army has been assigned the responsibility for carrying forward the details of the bill and its justifications.

Senator Byrd. To go back to the capital investment during construction, do you recommend it? You say you have no objection. Are you in favor of it?

Mr. Larkin. No, sir. We take a neutral attitude. We are not sponsoring this deletion as such. We are content with it as it appears.

Senator Byrd. Is that the same position you have?

Mr. Seidman. Yes.

Senator Byrd. You do favor deleting "the rate of tolls shall not exceed $1 per net vessel ton?

Mr. Larkin. Yes.

Mr. Seidman. It is wholly inconsistent with the objective of placing the Bureau on a self-sustaining basis.

Mr. Larkin. As in the case of many other legislative items on the Department of Defense program, the Office of the Secretary assigns responsibility for the different bills [fol. 104] to different departments, depending on the department that has the predominant interest. In this case the Department of the Army is the representative for the whole Department of Defense, and Mr. Frank Shackelford, the counsel of the Department of the Army, is present to give for the record the Department of the Army's views, which I am just certifying to you are the views of the whole Department of Defense.

Senator Byrd. To make clear again, you have no objection, you advance no objection to not considering capital investment during time of construction? You have no objection to it, you simply do not approve it; is that right?

Mr. Larkin. We are content with it as it is, we have not sponsored it affirmatively.

Senator Byrd. Thank you very much, Mr. Larkin. You may be released.

Next is Mr. Francis Shackelford, General Counsel of the Department of the Army.

Statement of Francis Shackelford, Counselor of the Department of the Army

Mr. Shackelford. Mr. Chairman, as counselor of the Department of the Army, I am appearing before you today in behalf of the Defense Department to state briefly the position of the Army on H. R. 8677. The Department favors its enactment provided there is deleted the amendment in subsection (b) of section 14 establishing a ceiling of $1 on tolls and provided there is restored section 7 of the bill as originally introduced in the House, requiring damage claims arising out of injuries in the locks or waterway to be brought against the Panama Canal Company, not the Canal Zone government. The section on damage claims

was apparently indvertently stricken before the passage of the bill by the House. Since under the terms of H. R. 8677 the Canal waterway would be transferred to the Canal Company, it follows that the adjustment of any damage claims resulting from the use of the waterway or its locks should be the responsibility of the corporation.

In accordance with the general recommendations of the Commission on the Organization of the Executive Branch of the Government, H. R. 8677 would permit the transfer of business-type activities, including the operation and maintenance of the waterway, to a corporate entity, with resulting greater flexibility of management and simpler accounting, budgeting, and auditing methods. The Canal Zone government would then administer only such basically governmental functions as health, sanitation, education, police, and fire protection.

The more efficient mangagement of the business-type activities in the Panama Canal area should enhance rather than hurt the military usefulness of the Canal.

Concerning the amendment placing a ceiling of $1 per net vessel-ton on the toll rates, the Army believes that the enactment of such an arbitrary ceiling would be unrealistic, since it would tend to nullify the earlier part of the same subsection requiring tolls to be—

prescribed at a rate or rates calculated to cover, as nearly as practicable, all costs of maintaining and operating the Panama Canal.

[fol. 105] An arbitrary ceiling might well make it impossible for the Panama Canal Company to fix its tolls at a rate high enough to meet the economic and operating conditions at a given time. This would destroy one of the main purposes for the passage of this legislation.

H. R. 8677 primarily concerns improved management and accounting procedures relating to the Government's business operations in the Panama Canal area and Mr. Harold Seidman, of the Bureau of the Budget, has already discussed the fiscal details of the bill.

Senator Byrd. You do not request deletion from the House bill the item of interest on capital investment during time of construction?

Mr. Shackelford. No, sir. Our position is the same as

Mr. Larkin's and Mr. Seidman's, the position they have already taken on that point.

Senator Byrd. Thank you very much, Mr. Shackelford.

Mr. Shackelford. Thank you, Mr. Chairman.

Senator Byrd. I see my old friend, Senator Joe Ball, in the audience, with whom I served in the Senate. I will be very glad to hear from him.

This is Senator Joseph H. Ball, representing the Association of American Shipowners.

Statement of Joseph H. Ball, Vice President, Association of American Shipowners

Mr. Ball. Mr. Chairman, I realize you are cramped for time. I would like to just insert in the record the statement which I made for our association before the House committee, which discusses the general subject, and then just make a short statement extemporaneously on the bill as it came over from the House.

Senator Byrd. Very well, it may be inserted in the record at this point.

(The statement referred to above is as follows:)

Statement of Joseph H. Ball, Vice President, Association of American Shipowners

My name is Joseph H. Ball. I am vice president of the Association of American Shipowners, which has offices at 90 Broad Street, New York, N. Y., and at 1713 K Street NW., Washington, D. C. Our association is composed of some of the oldest and best-established companies operating American-flag ships. None of them has received any subsidy under the Merchant Marine Act, 1936. They are engaged in both the foreign and domestic trades.

Several members of our association are in the intercoastal trade, and use the Panama Canal constantly. Most of them use the Canal at times and all of them are interested in the question of Panama Canal tolls and administration and therefore in H. R. 8677.

Naturally, shipping companies would like the Panama Canal tolls as low as possible because the round-trip cost of transiting the Canal, now from $12,000 to $15,000, is a substantial item in operating costs, particularly to the inter-

coastal lines which are just beginning to revive following their complete elimination during World War II and which are facing stiff competition from railroad and trucking companies. How important Canal toll costs are to the intercoastal lines is indicated by a 1939 study made by the Maritime Commission. The study showed that during the preceding 5 years the intercoastal companies had shown a net aggregate loss of $4,000,000. During the same period they had paid a total of approximately $25,000,000 of Canal tolls.

I am sure I need not further emphasize to this subcommittee the importance of operating costs among problems of intercoastal lines.

[fol. 106] I assume that H. R. 8677 and the companion bill in the Senate, S. 3649, were drafted by the Department of the Army and the Bureau of the Budget to carry out the recommendations of the Budget Bureau in its report to the President, January 31, 1950 (H. Doc. No. 460, 81st Cong., 2d sess.), or at least those recommendations which were approved by the President. The only recommendation of the Budget Bureau not carried out by H. R. 8677, so far as I can determine, is that the Canal administration be transferred to the Department of Commerce. President Truman reserved judgment on this particular recommendation that the business and governmental functions in the

Our association supports the Budget Bureau recommendation that the business and governmental functions in the Canal Zone be separated and I shall therefore confine my testimony to the provision of H. R. 8677, dealing with Canal tolls, sections 24 and 25, beginning on page 19.

We have no objection to section 24 which transfers the authority to fix tolls and basic rules of measurement to the Panama Canal Company, subject to final approval by the President. The transfer of authority retains the present provision in the law requiring 6 months' notice, by publication in the Federal Register, of any proposed change in toll rates or measurement rules.

Our association does take exception to the Budget Bureau's recommendations as to the method of computing toll rates and to section 25 of H. R. 8677, which would implement those recommendations. Section 25 proposes the following changes in existing law:

1. It eliminates both the minimum and maximum toll rates for laden vessels, which are now 75 cents and $1 per ton respectively.

2. Where the present law contains no standards to guide determination of toll rates, the proposed new subsection 412(b) would require that tolls be fixed at a rate calculated to cover, as nearly as practicable:

(a) All costs of operating the Panama Canal and the facilities and appurtenances relating thereto;

(b) Interest and depreciation on the capital investment in the Canal and ancillary facilities (rate not specified); and

(c) A share of the net costs of operation of the civil government of the Canal Zone proportionate to the ratio which gross Canal tolls bears to the net revenues from all other business operations of the Panama Canal Company. Although H. R. 8677 in lines 5 through 11, page 21, refers to gross revenues from tolls and also to total gross reveneus of the corporation, it provides that in computing gross revenues from other business operations, the cost of commodities resold and revenues arising from transactions within the corporation and from transaction with the Canal Zone government shall be deducted. That has the effect of reducing the revenues from business operations other than the Canal to a net rather than a gross basis. The result would be to load almost the entire cost of civil government onto Canal tolls and exempt residents of the Canal Zone from paying more than a very nominal part of the cost of civil government.

3. Transit tolls on vessels owned or operated by the United States, which now transit the Canal free, would be computed and treated as part of Canal revenues in fixing commercial tolls, but the President would be given discretion to decide whether such vessels actually would pay tolls.

The Budget Bureau report recommended (p. 8) that the interest charged on capital investment in the Canal be at current average long-term rates paid by the Government, which is 2.3 percent. This is not provided specifically in H. R. 8677, although section 246(b) of the Panama Canal Code now provides that the Company shall pay interest on capital to the Treasury at a rate which the Secretary of the

Treasury determines is required to reimburse the Treasury for its cost.

Heretofore in Canal bookkeeping, as the subcommittee knows, revenues from commercial tolls (no allowance has been made for free transits of the Canal), civil revenues and net earnings of business enterprises have been lumped together and balanced against net appropriation expenses to determine net revenues, which have ranged all the way from $18,000,000 annually to a deficit of over $5,000,000 in 1944. Then the accountants have deducted an interest charge of 3 percent annually on capital (now figured at $516,000,000). Whereas net revenues since the Canal was first opened for operation in 1914 totaled nearly $274,000,000 to June 30, 1949, the 3 percent interest charge changed this into a net deficit of nearly $167,000,000 on that date.

To revert for a moment to the Budget Bureau report: that report on page 8 correctly points out:

[fol. 107] "The most controversial aspects of tolls policy are (1) the interest charged on the capital investment; and (2) the question of whether any of the costs of construction, operating, and maintaining the Canal should be allocated to national defense."

The Budget Bureau study resolves the question of capital allocation cost between national defense and commercial use with a very brief discussion concluding that none of the capital cost should be allocated to national defense. It does recommend that the cost of currently free transits of Government vessels should be included in revenue of the Canal and enter into determination of toll rates.

The Budget Bureau study makes no mention whatever nor does H. R. 8677 make any allowance for a factor which we believe is worthy of consideration by Congress in fixing policy on this issue. That factor is the tremendous value of the Canal is serving the foreign and domestic commerce of the United States. The Federal Government has spent hundreds of millions of dollars improving our rivers and harbors, even building canals, to serve the commerce of the United States. No federal tolls are charged to vessels using harbor facilities in New York, Boston, Baltimore, New Orleans, Savannah, San Francisco, and our other ports

where the Army engineers at the direction of Congress have spent many hundreds of millions of dollars improving the harbors. Congress adopted this policy and authorized these expenditures, without levying a direct charge to those using them, on the theory that all of the commerce of the United States benefits from them and that therefore the benefits of such improvements were general enough so that their costs equitably could be spread over all the taxpayers. These harbors, incidentally, are open on the same terms to American flag ships and foreign shipping, the thinking again being that it was the commerce of the United States, and not the ship operators, which benefited from the improvements.

In the discussion of the Canal tolls problem much has been made of the fact that half or more of the shipping using the Canal is of foreign registry and that, therefore, foreign-ship operators would derive at least half the benefit of any lowering of tolls that might result from changes in the present formula on which tolls charges are based.

But that argument overlooks the very important fact that approximately two-thirds of the total commercial tonnage transiting the Canal either originates in the United States, is destined for the United States, or both. If the transits by Government vessels of the United States were included, the percentage of tonnage transiting the Canal directly serving the commerce or defense of the United States would be more than 70 percent.

The percentage I have just mentioned is derived from tables in the 1948 and 1949 Reports of the Governor of the Panama Canal. The figures are shown in exhibit A, attached to my statement, which I ask to have included in the record. These tables show that, of the total of 24,000,000 tons plus transiting the Canal in 1948, 16,000,000 tons either originated in the United States, was destined for the United States, or both. In 1949, the proportion was 17,000,000 out of a total of 25,000,000 tons. I cite these figures to show that, to the extent of at least two-thirds of the total tonnage moving through the Canal, that improvement serves the over-all commerce of the United States just as directly as do the many harbors on the east and west coasts which have been improved with Federal funds. That seems to our association a fact which Congress could well take

into account when writing into legislation the formula by which tolls in the future should be fixed.

The questions of how much of the capital cost of the Canal should be allocated to national defense, and the interest charged during construction and since, also seem to us to be issues that Congress should decide in legislation rather than leaving them to executive determination, as does existing law, which would be unchanged by H. R. 8677. The way in which these questions are resolved will affect directly not only our domestic merchant marine but also our whole foreign trade and commerce, and they should be decided by Congress.

The history of Canal accounting practices in itself demonstrates that this is a field of controversy where there is room for honest differences of opinion. The original construction cost of the Canal was $385,000,000. A Government commission in 1921 found that, of that cost, approximately $113,000,000 properly should be allocated to national defense. Subsequent commissions in 1931 and 1937 reversed that decision and found that the entire cost of [fol. 108] $385,000,000, plus $129,000,000 interest during construction, plus $12,000,000 in payments to the Republic of Panama, all should be included in the capital base on which commercial tolls should be fixed so as to pay all operating costs plus 3 percent interest on this capitalization. In recent years the 3-percent interest has been charged on $516,000,000 of capitalization.

That the Canal is of tremendous value to national defense cannot be denied. If it were not there, the additional cost of the Navy due to lack of mobility of its Pacific and Atlantic fleets probably would run annually into several times the total cost of the Canal at our present rate of defense expenditure. One could make a logical argument that the savings in naval and war shipping costs during World War II alone would justify writing off the entire investment in the Canal as a national-defense expenditure.

On the other hand, it could be argued that Canal tolls might be doubled or quadrupled without destroying completely the use of the Canal and thereby a very large profit returned annually to the Treasury. Presumably, as long as tolls were substantially below the cost of taking a ship around the Horn, ships still would use the Canal and pay the

toll. Our domestic intercoastal trade undoubtedly would be liquidated by such a course of charging all the traffic would bear, but in 1948 the intercoastal shipping accounted for only 15 percent of the total tonnage going through the Canal, and even less in 1949; so that, as a strictly profit-making enterprise, the Canal could increase its revenues to the maximum by raising tolls to the limit traffic would bear. United States commerce, of course, would pay two-thirds of the additional cost.

But it is perfectly apparent that the Panama Canal is not that kind of purely commercial enterprise. For one thing, no commercial concern could have negotiated the various treaties with Panama under which the Canal Zone was ceded to the United States and the Canal constructed. Somewhere between these two extremes of charging off the Canal completely to national defense (or treating it as we do our river and harbor improvements) and a purely commercial approach aimed at making the maximum profit to the Federal Treasury lies the sound solution.

As has been pointed out, it is a fruitless undertaking to attempt to go back 40 years and determine whether commercial or defense considerations were uppermost in the minds of those who were responsible for the Canal project. Furthermore, it is not necessary. The Canal has demonstrated its tremendous value in our defense in two wars. Its value to our over-all commerce is shown in the annual reports of the Governor. It is for Congress to determine what portion of the cost of the Canal properly should be charged off to those two purposes. Different persons undoubtedly can arrive at different conclusions from the same set of facts, but our association believes that a minimum of half of the capital cost of the Canal should be so allocated.

Our association strongly urges this subcommittee, and the full committee, to rewrite the new subsections 412(b) and (c) proposed by H. R. 8677, beginning on line 24 of page 20, so as to do five things:

1. Require that a fair proportion of the cost of operating and maintaining the Canal be allocated to national defense, preferably specifying a minimum percentage to be so allocated in the law. The proportion of United States Govern-

ment vessels transiting the Canal indicates that the very least percentage of cost so allocated should be 10 percent.

2. Require that a fair proportion of the capital cost of the Canal and its ancillary facilities be allocated to national defense, specifying a minimum percentage to be so allocated in the law. Our association believes that minimum percentage should be at least 50 percent.

3. Specify that the interest rate to be paid the Treasury on the capital allocated to commercial operations shall not be greater than the average rate of interest borne by all interest-bearing, long-term public issues of the United States at the time toll rates are fixed. While section 246(b) of the Panama Canal Code may cover this particular issue, we believe it would be safer to spell it out in the section dealing with the fixing of Canal tolls.

4. Require that the net costs of civil government in the Canal Zone be distributed among all business-type operations in the zone, including Government commissaries, in proportion to their gross revenues. This appears to our association to be the only fair and equitable way of distributing these costs, which are in lieu of the taxes these business-type operations otherwise would pay. As we have pointed out, the proposal in this regard in H. R. 8677 is completely unfair in that it applies these government costs to gross revenues of the Canal but only to net revenues of other business-type operations.

[fol. 109] 5. Retain a maximum toll rate for laden commercial vessels in the law, preferably at the present maximum of $1 per ton. I realize that this is perhaps putting an extra padlock on the gate. But our association is vitally concerned with the intercoastal trade, and any substantial increase in Canal tolls at this time would be a most serious burden to that trade, which is facing enough difficulties in surviving as it is.

Under the tolls formula proposed in H. R. 8677 as it stands, an increase of 30 cents or more per ton in commercial tolls would be certain, depending on the volume of Government vessels transiting the Canal and the percentage of civil-government costs allocated to the Canal operation. Such an increase, which would amount to $2,000 to $2,500 for each transit of the Canal by a C-type vessel, would be a considerable burden on American-flag operators, and particularly on the intercoastal lines, which already are having

a difficult time keeping their costs low enough to compete with the railroads.

In conclusion, our association again emphasizes that our use of the Canal in two world wars, as well as its tremendous value in serving the over-all trade and commerce of the United States, amply justifies Congress in allocating a substantial part of the original cost of the Panama Canal to national defense, and we strongly urge adoption of an amendment to H. R. 8677 along the lines we have proposed. I thank you for this opportunity to present our views.

EXHIBIT A.—Association of American Ship Owners

Figures on Origin and Destination of Cargo Transiting Panama Canal in Fiscal year 1949, from Annual Report of the Governor of the Panama Canal

[Tables Nos. 37 and 38 on pp. 123-127]

	Fiscal year 1948		Fiscal year 1949	
	Tons	Percent	Tons	Percent
Westbound cargo:				
Total	8,679,140	100 0	9,899,088	100 0
United States origin	5,763,989	66 4	6,563,591	66 3
United States destination	2,137,807	24 6	2,035,030	20 6
Minus United States intercoastal	1,719,005		1,449,561	
Net United States destination	418,802		585,469	
Total United States origin, or destination, or both	6,182,791	71 3	7,149,060	72 2
Eastbound cargo:				
Total	15,438,522	100 0	15,406,070	100 0
United States origin	4,896,573	31 7	2,839,985	18 4
United States destination	7,079,613	45 9	8,929,766	58 0
Minus United States intercoastal	2,118,799		1,611,157	
Net United States destination	4,960,814		7,288,609	
Total United States origin, or destination, or both	9,857,387	63 8	10,128,594	65 7
Both directions:				
Total cargo	24,117,662	100 0	25,305,158	100 0
United States origin, or destination, or both	16,040,178	65 5	17,277,654	68 2
Total United States intercoastal	3,837,804	15 1	3,090,718	12 2

EXHIBIT B—Proposed Amendment to H. R. 8677

Beginning with line 24, page 20, strike out through line 23 on page 21, and insert—

"(b) Tolls on merchant vessels and yachts shall be prescribed at a rate or rates sufficient, under normal traffic conditions, to cover but not exceed (1) such part of the expense of maintaining and operating the Canal (in no event more than —— per centum of such expense) as is fairly allocable to non-national-defense purposes of the Canal, plus (2) interest on such portion of the depreciated capital cost (not in excess of —— per centum of such cost) of the Canal (including improvements) as is fairly allocable to non-national-defense purposes of the Canal, such interest to be at a rate not greater than the average rate of interest borne by all interest-bearing long-term public issues of the United States at the time such toll rate or rates are prescribed, plus (3) that part of the net costs of operation of the agency known as the Canal Zone government which [fol. 110] bears the same ratio to the total net costs of such agency as the estimated gross toll revenues of the Canal bears to the estimated total gross revenues of the corporation from all business-type operations, including commissaries. For the purposes of this section, the allocation of expenses and costs between national defense and non-national-defense purposes of the Canal shall be made on the basis of the relationship between the value of the benefit of the Canal as a military asset to all of the people of the United States and the value of the benefit of the Canal as a commercial asset to shippers of goods. The rate of tolls on laden merchant vessels shall not exceed $1.00 per net ton as determined under the rules for the measurement of vessels for the Panama Canal. In addition to the tolls based on measurement or displacement tonnage, tolls may be levied on passengers at rates not to exceed $1.50 for each passenger. As used in this subsection, 'the Canal' includes only the Canal itself and its ancillary facilities and equipment for vessel transit purposes.

"(c) Public vessels of the United States, including warships, naval tenders, colliers, tankers, transport , hospital ships, and other vessels owned or chartered by the United States for transporting troops or supplies, may be transited

through the Canal free or be required to pay tolls, in the discretion of the President."

Mr. Ball. Our association felt that much more recognition of the defense purposes and the value of the Canal should have been given in the formula provided in the bill than is the case as it was submitted and as it was passed by the House. We are very much in favor of the change in accounting practices there and the separation of business and Government functions. It is practically impossible now for a layman studying the Panama Canal reports to figure out exactly what costs belong in a business category and which ones properly belong on the Government side, or even to separate the defense costs from commercial costs.

We suggested in the House committee keeping the $1 limit on tolls largely because it does give Congress another opportunity to examine the whole picture in case tolls, which are now at 90 cents, should go above $1 under the formula.

I agree with Mr. Seidman that it is perhaps inconsistent with the formula proposed in the bill and its main purpose to some extent; but it is not, in my opinion, entirely inconsistent because of the fact that, for one thing, the formula is stated in very broad language. Until it is actually applied, Congress cannot know exactly how it will work out, and this gives Congress another chance to examine it in case it does result in a substantial boost in tolls; and that makes considerable sense, because I think Congress is as much interested in what happens——

Senator Byrd. You agree with Mr. Seidman that, if you include interest during construction, the rate would be approximately $1.05 under this bill?

Mr. Ball. I do not know, Mr. Chairman, what the rate would be.

Senator Byrd. That is the estimate.

Mr. Ball. I heard his estimate; but, until you know what that is based on and why that formula is going to be applied, we do not know frankly what the rate will be.

In our association we have at least three shipping companies that are in the intercoastal trade, which is about one-third today what it was prior to World War II. Lines

in the intercoastal business are having a difficult time surviving; yet they are a vital part of our merchant marine. A very steep increase in the Canal tolls would make it difficult for them.

We think it is an important enough factor to justify having Congress take another look at this formula if it [fol. 111] should result in tolls above $1. For instance, the language in the bill which provides for the allocation of civil-government costs between the commercial operation of the Canal and other business operations is pretty general and vague. It could be applied a number of different ways. Until you actually see how it is applied, you do not know how fairly it is going to work out. That is why we have supported the $1 limitation.

Also, I do not know whether the allocation of $29,000,000 in interest charged during the construction period represents a fair determination of the original defense value of the Canal or not. We thought in the beginning it was probably equivalent; it was at least half defense.

Senator Byrd. A substantial loss, in any event; is that not right?

Mr. Ball. In actual operating expenses they show a little profit—have most of the years—but when they add the 3 percent interest charge on the $534,000,000 capital investment——

Senator Byrd. That is 10 cents a ton.

Mr. Ball. They have had a $534,000,000 capital base.

Senator Byrd. I mean the interest during construction amounts to 10 cents a ton.

Mr. Ball. That would be on the forty-nine——

Senator Byrd. Mr. Seidman says in his testimony:

The objective of the present formula has not been achieved in practice, and the Canal accounts reflect substantial losses. If the Canal were to be made self-sustaining on this basis, tolls would have to be increased to at least $1.40 a ton.

Mr. Ball. I think that is correct.

Senator Byrd. It is not paying its way now.

Mr. Ball. Not with that 3 percent and not with the capital structure they have built up. I think the capital structure is much larger than it should be.

Senator Byrd. What is the tonnage of the Panama Canal a year?

Mr. Ball. About 20,000,000 tons.

Mr. Seidman. Somewhat more than that, I believe.

Senator Byrd. Twenty million tons.

Mr. Seidman. I think it has gone up.

Senator Byrd. Should be $1.40, and you are getting 90 cents. That would be about ten million a year.

Mr. Ball. Twenty-five million tons approximately.

Senator Byrd. If this $1.40 figure is correct, you would be losing almost 50 cents a ton.

Mr. Ball. That is under a formula the Budget Bureau agrees is not realistic or fair to shipping interests. They do disagree. I think shipping interests in the beginning felt a much larger part of the original capital cost than is represented by this $129,000,000 interest charged during construction should be charged off to national defense. I think all of the shipping interests are willing to accept the compromise; I do not know how the Federation feels about the dollar limitation.

Senator Byrd. The charge during construction is 10 cents a ton. If you take the interest off, it still leaves $1.30 a ton.

Mr. Seidman. That is on the basis of the old formula, which has never been applied, which we regarded as not being entirely equitable, and there are recommendations made for revision of the tolls formula.

[fol. 112] Senator Byrd. Does the new formula actually cover costs?

Mr. Seidman. Yes; including interest.

Senator Byrd. You figure that will be $1.05?

Mr. Seidman. That is the best we can figure.

Senator Byrd. There is a big difference between that and the old formula.

Mr. Seidman. I can explain some of that difference fairly readily. For one thing, under the present formula the complete cost of transiting military and Government vessels is borne by commercial shipping entirely. They pay no credit and there is no credit. We propose not necessarily that they pay, but that the Canal have the benefit of the credit. That amounts to an average of almost $2,500,000 a year. Of course, during the war years it went up to almost 75 percent. Then under the present formula all the costs of civil government, health, and sanitation, are charged against the tolls. The Panama Rail-

road Company does not contribute hardly anything to that. That is charged against tolls. This will be spread over the whole enterprise.

Again taking very rough estimates, there would be about 50 percent. I think the Chief of the Management Division of the Panama Canal did provide estimates of about 53 percent of the 1949 figures would be against tolls.

Mr. Chambers. When you redistribute the costs among various businesses like commissaries, et cetera, the net result will be they will have to be self-sustaining and contribute their share toward the over-all operating costs of the Canal.

Mr. Seidman. It is the intention of this bill that the whole enterprise shall be self-sustaining and conducted without either direct or indirect cost to the United States Treasury.

Mr. Chambers. To whatever extent that comes about, that will be reflected in reduced charges against the ships going through the Canal?

Mr. Seidman: Yes; to the extent that these costs are borne by other than shipping, they will naturally be reflected in the tolls.

Senator Byrd. Interest on investment——

Mr. Seidman. It includes interest on the investment. In estimating the interest, of course, each of these business operations, any business has to carry its share of the interest, too, in proportion to the investment.

Senator Byrd. What about military and Government vessels?

Mr. Seidman. There would be a credit there for the amount of tolls. That is now computed in the Canal account. They keep a record of it, but they have never taken any credit for it in estimating the toll.

Mr. Chambers. If we take away this one-hundred-some-odd-million dollars of interest on capital investment, is there going to be any reduction in the charge against Government vessels that would pass through the Canal, or will they pay the same rate commercial ships pay?

Mr. Seidman. Under the terms of the bill as introduced in the House, they would have the same rate and no change was made in that in the House. That is again, as I say, not a recommendation made by the President. It was an amendment put on in the House.

Mr. Chambers. Coming back to these commissary and other businesses that you operate down there, in figuring [fol. 113] out the amount that they have to pay, the interest they have to pay, are you leaving in the interest on capital investment at the time of construction?

Mr. Seidman. No.

Mr. Chambers. So if you take it out for tolls, you will also take it out as a charge against other businesses of the Canal?

Mr. Seidman. Except to the extent that may reflect costs during construction for those businesses, which I doubt, because the Panama Railroad Company, for instance, was there before there was a canal, and I would assume that the charge of interest during construction is a cost exclusively against the transit operation and has been in the past.

That was part of the cost of constructing the Canal and not of the other business divisions.

Senator Byrd. Would this 10 cents be applicable to 24,000,000 tons of shipping?

Mr. Seidman. Approximately.

Senator Byrd. This $2,500,000 would be a loss to the Government as a contribution, so to speak, if it should be adopted, to the national defense.

Is there anything else in this that takes into consideration the value of the Panama Canal to national defense?

Mr. Seidman. They do not necessarily come directly out of the Treasury. There were two features in the original bill. One was there would be the credit for the transiting of military and Government vessels. In other words, in the future they would pay.

Senator Byrd. The Government would have to pay for the military vessels?

Mr. Seidman. It is a cost we did not feel was proper to pass on to commercial shipping.

Senator Byrd. Is there a subsidy that would be given, except the $2,500,000, if we should cancel it, on the interest during the time that the Canal was under construction, not after it was completed, but during construction?

Mr. Seidman. That is right.

Senator Byrd. You would still get a return on the actual money invested in the Canal on an interest basis of 3 per cent?

Mr. Seidman. That is right, and we expect in the future to absorb certain costs.

Senator Byrd. Is that 3 percent?

Mr. Seidman. The going rate, the going long-term rate.

Senator Byrd. If you delete this thing about the interest on construction, it would mean that the Federal Government would be losing on that interest $2,500,000 a year.

Mr. Seidman. That is right.

Senator Byrd. Outside of that, it would be a self-sustaining proposition?

Mr. Seidman. Yes.

Mr. Chambers. Wouldn't that $2,500,000 be reduced by the number of Government ships that went through there? In other words, we are not going to have the Government pay itself, it is going to be a credit on the books; so we are saying there will be a reduction in the loss to the Government only where the commercial ships going through are concerned, and at the present time it is about 60 percent, but it fluctuates.

[fol. 114] Senator Byrd. The Government makes lots of investments all around where they do not get any interest on it.

Mr. Seidman. This would be unique. If I might point out, there are some unique provisions. The employees compensation requirement—that is usually paid by the Civil Service Commission, but we expect that to be covered, and interest and depreciation.

Senator Byrd. As far as the authority of the Budget Bureau, if we report this bill favorably, the activity, you say, will pay its way, the Government will pay for their vessels, private people will pay for their vessels, and the only loss that will occur is the loss if you assume the interest.

Mr. Seidman. That is right, and that was not in the Canal account until 1932.

Senator Byrd. You will get interest on the amount invested?

Mr. Seidman. And any future investment.

Senator Byrd. Senator Ball, do you have anything further?

Mr. Ball. I believe what he says shows the $1.40 figure is a completely unrealistic figure insofar as reflecting the actual cost that should be borne by commercial transit.

In other words, commercial tolls have been loaded in the Canal accounting with all the costs there were down there, just lumped everything together.

Senator Byrd. Including the costs of civil government.

This tonnage figure includes Government vessels; does it?

Mr. Ball. I am not certain.

Mr. Seidman. Is that right, Mr. Burdick?

Mr. Burdick. For the last fiscal year it was slightly over 28,000,000 tons of commercial shipping.

Mr. Seidman. That traffic has gone up considerably in the last year, has it not, Mr. Burdick?

Mr. Burdick. Yes.

Senator Byrd. Mr. Burdick, have you got any statement to make?

Statement of Bernard F. Burdick, Chief of Office of the Panama Canal

Mr. Burdick. I have no prepared statement to make. I am here as the representative of the Governor of the Panama Canal.

Senator Byrd. We will be glad to have any statement you care to make about this bill.

Mr. Burdick. As a matter of law, the Governor of the Panama Canal who is the President of the Company which under the terms of this bill would maintain and operate the waterway and all of the facilities, with the exception of the activities connected with civil government.

Senator Byrd. Does the Governor have any recommendations to make to this committee with respect to this bill?

Mr. Burdick. I have no statement, Mr. Chairman, unless you want the views of the Governor with respect to the amendments.

Senator Byrd. I am always glad to hear the views of anybody that is interested in the legislation if he cares to make a statement, either now or send it to me in the next day or two. I will be glad to give it consideration in making my report. Is there any part of the bill that you object to?

[fol. 115] Mr. Burdick. The amendment with respect to the dollar limitation the Governor feels is wholly inconsistent with the recommendations of the President, wholly

inconsistent with the philosophy of the bill, which is to set up the obligations, to fix the obligations of the company, and to provide revenues to pay those obligations.

Under the bill the Company would have fixed obligations:

One, to pay the Corporation's cost of operation, including depreciation, the cost of services rendered by other Government agencies;

Two, to pay interest on the Government net direct investment in the Company;

Three, to reimburse the Treasury for annuity payments to the Republic of Panama; and

Four, to pay the net costs of the Government and sanitation of the Canal Zone.

Now against that we would have all of the revenues of the Company and would have the use of the tolls.

Senator Byrd. You would have the credit from the Government ships, too, would you not?

Mr. Burdick. Yes, for the purpose of determining whether we are actually paying the required interest rate to the Treasury. That is, the going interest rate.

Senator Byrd. What have you got to say about the interest while under construction?

Mr. Burdick. That, Mr. Chairman, is a matter that the Governor feels, as the other agencies do, that it is a matter of national policy that should be determined by legislation. He would like to see a fair and just rate charged to all users of the Canal, American as well as foreign-flag vessels. Had he been present he would have pointed out that the study of the Budget Bureau referred to the efficiency report in 1931 and the Neutral Tolls Committee in 1937, that no major part of the capital cost of the Canal should be allocated to national defense. The conclusions of the Budget Bureau are set forth in the report before you.

Senator Byrd. Do you regard that as a major part, interest while under construction?

Mr. Burdick. We are merely pointing out that that will affect the tolls rate, and we are saying that is a matter which should be determined by Congress as a national policy.

Senator Byrd. That would not be major, would it?

Mr. Burdick. No, sir. We are pointing out that the solution proposed by the Bureau of the Budget of this

problem was that both Government and the commercial vessels pay on a user basis. That is in the bill. In addition, this amendment would write off

Senator Byrd. Would the foreign vessels be on a different basis from the American?

Mr. Burdick. No, sir. Under the treaty commitments they pay the same rate as American-flag vessels.

Senator Byrd. I think the Government vessels should pay in the way of a credit.

Mr. Burdick. I think all are agreed on that, that they should pay on a user basis.

Senator Byrd. Do you agree with the representative of the Bureau of the Budget that the only contribution in the bill toward national defense, so to speak, is the fact [fol. 116] that if we delete the amendment whereby they pay interest on construction, that would be about the only contribution that would be made toward national defense from the General Treasury? In other words, it would be otherwise self-sustaining; is that right?

Mr. Burdick. I think that is right. It is not the only recognition, however, in the bill.

Senator Byrd. What other recognition?

Mr. Burdick. The recognition comes in the separation of the civil government from the other.

Senator Byrd. What is the cost of the civil government there?

Mr. Burdick. Including sanitation, it is about $7,000,000 a year.

Senator Byrd. Is that entirely in connection with operating the Canal?

Mr. Burdick. That has been the theory in the past, that the only need for civil government and sanitation was incidental to the maintenance and operation of the Canal.

Senator Byrd. The tolls would not pay anything toward the civil government under this new bill?

Mr. Burdick. They would pay, according to the estimate, about half of that. The other would be charged

Senator Byrd. If it is $7,000,000, would there be an appropriation made for the three and a half million?

Mr. Burdick. No. I think we could say an appropriation would not be made.

Senator Byrd. From what source is it to be paid?

Mr. Burdick. As I understand it, the tolls rate, if you eliminate the maximum rate here, will be set high enough to pay about half of that. The other half will be paid by these business divisions. That will come from their customers. Some are Government employees, some are Army and Navy——

Senator Byrd. You said a few minutes ago the cost of civil government was a recognition of national defense. The Federal Treasury pays nothing under this bill toward operation of civil government; is that right? One-half is paid by the business people and the other half is a charge to tolls?

Mr. Burdick. It is a recognition, first, because we write out of the capital account the amount that heretofore has been included in there for the installations and facilities necessary to conduct the civil government and the sanitation.

Senator Byrd. No interest charge on that?

Mr. Burdick. That is right.

Senator Byrd. Of course, there should not be. But for all practical purposes, it is pretty nearly self-sustaining under this bill, except for the thought of trying to get interest during the time of construction; am I correct about that? It is practically self-sustaining from the standpoint of the collection of tolls, except on this interest feature, if that should be taken out of the bill. If that is left in the bill—if you take the House bill as it is, eliminating the ceiling, it is self-sustaining?

Mr. Burdick. That is the intention of the bill; yes, sir.

Senator Byrd. Practically completely self-sustaining. There is no contribution from the Federal Treasury for the value of the Panama Canal for national defense; is that right?

Mr. Burdick. No; not other than the write-off of the interest.

Senator Byrd. Anything further, Mr. Burdick?

[fol. 117] Mr. Burdick. I would join in the recommendations that section 7 of the bill be restored, and we would have to defer to the judgment and be glad to, as to the extent of what other provisions of the bill can be included without delaying or defeating the bill. The Governor feels that all the provisions of the original bill are necessary to

complete legislative coverage of the objectives of the bill and that their enactment should not be deferred until the next session.

Senator Byrd: Excepting the limitation on the tolls, as I understand it, you have no specific recommendation to make about the bill as it stands now; is that right?

Mr. Burdick. Except to restore section 7 and any of the others that the committee might decide could be done without interfering with the passage of the bill.

Senator Byrd. Thank you, sir.

Our next witness will be Mr. Gregory Prince, assistant general counsel, representing the Association of American Railroads.

Statement of Gregory S. Prince, Assistant General Counsel, Association of American Railroads

Mr. Prince. As this committee well knows, Mr. Chairman, the subject of the Panama Canal tolls has received intensive study for the past several years. One phase of the study of this subject was an investigation made by a special subcommittee, under the chairmanship of Representative Thompson, of the House Merchant Marine and Fisheries Committee, pursuant to House Resolution 44, conducted in the first session of the Eighty-first Congress. As a part of that investigation there was a hearing at which testimony was presented by most of the witnesses who have appeared before the Panama Canal subcommittee with respect to H. R. 8677. Two witnesses representing the Association of American Railroads appeared before the Thompson subcommittee on June 14, 1949, and presented fully the views of the railroads with respect to the subject of Panama Canal tolls.

In view of the fact that H. R. 8677 is for the purpose of carrying out the recommendations made in the report by the Bureau of the Budget to the President and that such report by the Bureau of the Budget was made pursuant to a recommendation of the Thompson subcommittee, it is assumed that the record of the hearing pursuant to House Resolution 44 before the Thompson subcommittee is, as a practical matter, a part of the over-all record on the subject. Accordingly it is not felt necessary to repeat here all the views of the railroad as stated at that hearing.

However, in order that this committee may be advised of the scope of the previous presentation, there is here set forth at the outset a brief outline of the points therein covered.

The true nature of the proposal by the shipping interests that 50 percent of the Federal Government's investment in the Panama Canal be allocated to national defense was discussed. It was shown that the proposal would in essence amount to an annual subsidy and that the subsidy would be conferred in large part upon the operators of foreign vessels. It was also shown that the adoption of such a proposal would be in direct conflict with the national transportation policy declared in the Transportation Act of 1940.

Very substantial authority was quoted to demonstrate that the primary purpose of constructing the Canal was [fol. 118] as an aid to commerce. In support of this conclusion extensive quotations from a report by the special committee of three appointed by President Roosevelt in 1936 were included. The full importance of the Panama Canal from the standpoint of national defense was recognized. It was also pointed out that this special committee found that the service which the Canal renders to the United States Army and Navy vessels by allowing them to transit the Canal without charge might justly be regarded as but a partial compensation for the valuable service rendered by the Army and Navy in protecting the Canal and maintaing its neutral use by the vessels of commerce and war of all nations. It was recognized that the experience of the last war might justify a different treatment of the so-called forgiven tolls. By reason of the fact that commercial shipping under private operation came to a virtual standstill during the war and for several years thereafter as a result of the Government's assumption of the control and operation of such vessels, the view was expressed that the policy might be changed in this respect to require payment of tolls by Government vessels or the allowance of a credit for the transit of such vessels in calculating the tolls to be levied on commercial vessels.

It was also shown that for the period 1914 to 1948 the computed cumulative deficit amounted to approximately

$151,500,000; that toll-free transits in this period amounted to approximately $64,500,000; and that the deficit after allowance of such forgiven tolls was approximately $87,000,000. (Those figures brought down through the fiscal year 1949 would be as follows: Total computed deficit, $166,800,000; toll-free transits, $67,000,000; and adjusted deficit, $99,800,000.) A similar showing was made for the 10-year period 1939-48, which resulted in an adjusted deficit of approximately $79,000,000. It was also indicated that on the basis of the present methods of determining the level of tolls, modified to make allowance for toll-free transits, the toll rate would have to be increased from 90 cents a ton to approximately $1.35 a ton in order to place the operation of the Panama Canal on a self-sustaining basis.

These views as well as the views of shipping interests were before the Bureau of the Budget at the time they made their study and were explored in conference between representatives of the Bureau and the principal parties in interest. After a full consideration of the evidence and conflicting views as to this vital issue the Bureau of the Budget concluded that there should be no allocation to national defense of any part of the capital investment in the Panama Canal.

Two previous studies, both of which are referred to in the report of the Bureau of the Budget, reached precisely the same conclusion. The report (H. Doc. No. 460, 81st Cong., 1st sess.) had the following to say on the subject, at page 9:

Studies made by the Bureau of Efficiency in 1931 and by the special committee in 1937 determined that no major part of the capital costs of the Panama Canal should be allocated to national defense. The only additional feature of the Canal which might not have been included if it had been constructed exclusively for commercial use is the increase in the width of the locks from 100 to 110 feet. Actually the additional width has been an important factor in facilitating the approach to, and handling of commercial vessels in, the locks. There would appear to be no significant added costs in the construction of the Canal attributable solely to national defense.

The subsidy to national defense comes not from a failure to allocate capital costs but from the fact that military and other Government vessels do not pay tolls.

[fol. 119] Thus the Bureau of the Budget recommends that no part of the capital investment in the Canal be arbitrarily allocated to national defense and, in lieu thereof, that tolls be paid for the transit of military and other Government vessels, or that credit be allowed on account of such transits. This amounts to a recommendation that all of the costs of the Canal be divided on a user basis. The recommendation of the Bureau of the Budget on this point is unquestionably sound and should be adopted.

This principle is contained in section 25 of H. R. 8677, which amends section 412 of title 2 of the Canal Zone Code. It is heartily endorsed by the railroads, and the committee is urged to make no change in this respect.

As recommended by the Bureau of the Budget, H. R. 8677, in section 18 (e), provides that interest on investment shall be at a rate or rates determined by the Secretary of the Treasury as required to reimburse the Treasury for its cost. The Bureau of the Budget in its report estimated that the rate of interest presently required to reimburse the Treasury for its cost would be in the neighborhood of 2.3 percent. Under present procedures interest on investment is calculated at 3 percent.

Thus, it is apparent that immediately an advantage accrues to shipping interests by reason of the adoption of the theory of using the "going" rate of interest. Attention is also called to the fact that at various periods in the past the "going" rate of interest was higher than the flat 3 percent employed heretofore, and at such times an advantage accrued to shipping from the use of the nonfluctuating interest rate. The point we wish to make is that the committee should make it clear in its report that its decision with respect to the treatment of the rate of interest to be charged on the capital investment is a determination based on principle, not expediency, and that in the event the "going" rate of interest should go up in the future, the interest to be charged on the investment in the Panama Canal must also go up.

I should like to refer to one other recommendation of the Bureau of the Budget. In discussing the method of

arriving at the capital investment in the Panama Canal on which interest would be calculated, the representatives of the Bureau of the Budget suggested that there should be excluded from the amount of such investment figure first, the investment in national defense facilities, and second, the investment in civil government, health, and sanitation facilities. It was also suggested, as a third offset against the capital investment, that there be deducted the amount of the dividends which have been heretofore paid into the Treasury by the Panama Railroad Company, amounting to approximately $38,000,000.

No justification is seen for this third offset. The facts are that the operations of the Panama Railroad Company in the past have been sucessful and a substantial surplus has been accumulated from the conduct of its operations. On the other hand, the operation of the Panama Canal in the past has not been sucessful from a monetary standpoint and there has been accumulated a substantial deficit in the conduct of its operations. If the surplus accumulated by the successful segment of this new combined operation is to be deducted from the capitalization of the new organization, then certainly in all logic the accumulated deficit [fol. 120] of the unsuccessful segment of the combined organization should be added to the new capitalization. As already shown, the accumulated deficit from the operation of the Canal, even after a credit allowance for toll-free transits, amounts to approximately $100,000,000. Thus the net effect of taking into account the past operations of both segments of the new combined enterprise would be to increase the capitalization of the new organization by $62,000,000.

It is left to the wisdom of this committee and the Congress to determine whether to make a fresh start, using as the investment figure the net property investment shown on the books of the Canal, or whether to take into account the results of the past operations of the two principal segments of the combined enterprise. In no event, however, would it seem to be appropriate to take into account only the past operations of the Panama Railroad Company. Appropriate amendments to H. R. 8677 should be made to rectify this situation.

A major phrase of the recommendations of the Budget Bureau had to do with the organizational aspects of the

various activities conducted in the Canal Zone. In this connection it was recommended that all of the functions of the Panama Canal except those relating to civil government, health, and sanitation, be transferred to the Panama Railroad Company and that the railroad company's name be changed to the Panama Canal Company. Further, it was recommended that the new Panama Canal Company operate under types of controls designed to meet the needs of programs of a business character such as business-type budget and commercial-type audit. These recommendations would seem to be in accord with certain principles advocated by the Hoover Commission. The functions of civil government, health, and sanitation, would be lodged in an organization to be known as the Canal Zone Government. The result would be a division of the activities in the Canal Zone along functional lines.

In view of the requirement in paragraph (b) of section 412 of title 2 of the Canal Zone Code as it would be amended by this bill, that tolls be prescribed at a rate calculated to cover all costs of maintaining and operating the Canal, it seems clear that revenues from the railroad and other business activities of the new company are not to be used to subsidize the operation of the Canal itself. The reasons advanced for the realinement of the various activities in the Canal Zone would seem to be well founded and the provisions of the bill would seem to be adequate to carry out these recommendations.

A large number of the provisions of H. R. 8677 relate to the codification of certain laws and regulations governing the operation of the Panama Canal. If the other proposals contained in the bill are to be adopted, there would seem to be little question but that the codification provisions would be necessary. Thus, in general, with the exception of the treatment of the Panama Railroad Co.'s past dividends as a deduction from the capital investment figure for the Panama Canal, the railroads have no objections to the principles of H. R. 8677 and believe that the enactment of the bill amended to take care of the point mentioned above will in many respects result in the establishment of a more sound policy with respect to the operation of the Panama Canal than exists under the present law and procedures.

In conclusion, two further comments would seem appropriate in the light of certain questions from members of

the committee during the course of the hearing on this [fol. 121] bill. First, it is respectfully suggested that under no conditions should policies be adopted with respect to the establishment of tolls at the Panama Canal which have for their purpose the using of the level of tolls as a means of controlling competition between the various modes of transportation. Tolls at the Panama Canal should be set with the view alone to the establishment of rates which will make the Panama Canal a self-sustaining enterprise.

Second, the level of rates of tolls should never be employed as a means of subsidizing water carriers. The issue of the necessity of subsidies for carriers by water, either in domestic or foreign commerce, should be met squarely and considered separately. In the case of air carriers, for instance, the issue of subsidy has been greatly confused by reason of the payment for the transportation of mail being used as a vehicle for conferring subsidies. In that situation it has been clearly recognized by the President of the United States, the Secretary of Commerce, the Hoover Commission, several committees of Congress, and numerous impartial students of the problem, that there must be a separation of compensation for transportation of mail and subsidy to the airlines. Under no circumstances should confusion be introduced into a new area of transportation by any such step in the wrong direction. Nothing contained in H. R. 8677 would lend itself to the establishment of a rate of tolls at the Panama Canal designed to accomplish the unsound objectives referred to above, and it is respectfully requested that no amendments be considered which would do so.

I might for your benefit just outline very briefly the principles that we have adhered to in our consideration of the question of the Panama Canal tolls. We felt all along that the principle which should control in this situation is the establishment of procedures which would lead to making the Panama Canal a self-sufficient enterprise without conferring of a subsidy upon commercial shipping.

That commercial shipping to some extent being in competition with the railroads and also any subsidy which might be involved in the toll rate, as has already been explained, would apply to foreign shipping perhaps in greater amount than to American shipping. So that what we have

advocated has simply been that they set up the tolls on a basis that would be a self-liquidating and self-sustaining enterprise.

Senator Byrd. Do you regard the formula set forth in this bill as accomplishing that purpose?

Mr. Prince. We think the bill in its original form was certainly designed to do that and in its effect would substantially do that.

Senator Byrd. But would not do it with the limitation of a dollar, would it?

Mr. Prince. The two amendments made by the House I want to speak on at this point. One is the limitation of one dollar. As other witnesses have stated, that is, wholly inconsistent with the recommendations of the Bureau of the Budget, the recommendations of the President, and the bill in its theory and philosophy, and is contrary to the very provision in which that limitation is found.

We think that limitation should be eliminated, that it cannot be set up on a self-sustaining basis if you have an artificial ceiling. We advocate, very sincerely, that that limitation be removed.

The other matter, which is perhaps the only other highly controversial one at this point, is the question of interest during construction. We do not see that in principle that [fol. 122] is any different from any other cost. It is an actual cost; a cost that was incurred. Any private business has to incur the cost of interest on the funds used in construction of that business. We think that is a part of the cost. We feel that the elimination of free tolls for Government vessels is a fair change in the law.

We think they should pay tolls on the transit of Government vessels or, in lieu thereof, a credit, so that commercial vessels would not have to pay for that. But when you get it set up on that basis, then all the costs are included, and each pays according to its use. In peacetime, when the preponderant use is by commercial vessels, they would pay the preponderance of the tolls, and then in time of war, when the preponderant use is by military vessels, the major part of the cost would be charged to them.

Senator Byrd. Even then, let me ask you this question: Understand, I have not made up my mind, so far as my recommendation is concerned to the full committee, about

charging interest on the construction, but, even if that is taken out, this would be a fairer bill, insofar as paying the cost of operation down there, than the present law, would it not?

Mr. Prince. Yes; I would say it is, because of the artificiality we have now; we have both a minimum and a maximum.

Senator Byrd. The formula in this bill, even if you eliminate interest on construction, would be a fairer formula toward reaching a real cost of operation and charging it back to the shippers than the present legislation?

Mr. Prince: I think that is generally so.

Senator Byrd. I would like to ask the Budget representative that.

Mr. Seidman. I think that is absolutely correct.

Senator Byrd. You are charging 90 cents, and evidently it is costing $1.05 or $1.10. How do you pay the loss?

Mr. Seidman: They do not actually pay interest, so they are not making any payment on interest. The loss is on the books.

Senator Byrd. That is just a book account?

Mr. Seidman. And they also get an appropriation for the rest.

Senator Byrd. Are you paying the cost of operation down there under present tolls, under the present toll system, without regard to interest?

Mr. Seidman. I think it is just about covering its cost of operation.

Senator Byrd. Do you ask for reimbursement from the Government?

Mr. Seidman. The tolls are reappropriated; that is the effect. They balance each other out.

Senator Byrd. Anything further, Mr. Prince?

Mr. Prince. I might point out this. It has already been stated the toll rate under the present formula would have to go up to $1.40 to pay all the costs. The various recommendations that have been made by the Bureau of the Budget, which we think are generally sound, tend to reduce those costs chargeable to commercial vessels, so that it comes down to somewhere in the neighborhood of a dollar.

We have not objected, and we have not raised any objections at all, simply because these changes have a tendency

to reduce the toll. We have taken our position from the standpoint of principle.

Senator Byrd. I do not think under any conditions we ought to charge the cost of transmitting military and Government vessels to private shipping. Unless there is a [fol. 123] big profit in private shipping, that should not be done. The Government gives credit in everything else they buy or receive.

Mr. Prince. We think that is sound, and we generally support the bill. We merely object to these two changes made by the House.

Senator Byrd. Your main objection is to the ceiling?

Mr. Prince. The main objection is to the ceiling, and the next objection is to the exclusion of interest during construction.

Senator Byrd. All right, sir. Is there anything else?

Thank you very much, Mr. Prince.

Frazier Bailey, representing the National Federation of American Shipping.

Statement of Frazer A. Bailey, President of the National Federation of American Shipping, Inc.

Mr. Bailey. My name is Frazer A. Bailey. I am president of the National Federation of American Shipping, Inc., which represents more than one-half of all privately owned deep-water shipping under the United States flag.

On the matter of the ceiling, we, of course, would like a ceiling, but I want to say that the federation, the group I represent, would like a ceiling on the toll rate, but we did not ask for it in our presentation before either the Senate or the House and we are not urging it at this time.

On the matter of the interest during the construction period, we urged that there should be a greater recognition of the national-defense value of the Canal, and we pointed out that statesmen and the military at the time the Canal was conceived, and during the course of its construction, stated that one of the principal purposes for which the Canal was built was military including statements by President Theodore Roosevelt and the Governor of the Canal, from there all down the line.

We think that approximately one-half of it should have

been written off for national defense, as far as investment is concerned, for interest purposes.

The report of the Budget Bureau said——

Senator Byrd: Let me interrupt you. How much would that have amounted to a ton?

Mr. Bailey. About one-half of the $534,000,000, or approximately 20 cents a ton, I would say, instead of 10, in rough figures. Do you agree?

Mr. Seidman. I think under the proposal the Shipping Federation made before the House Committee, it would be, I guess, a little more than double. It would be approximately 20 cents a ton.

Mr. Bailey. That was a rough figure. We thought that should be the case.

The report of the Budget originally—I think Mr. Seidman will confirm it—said in their study it was impossible to determine whether national defense or commercial usage was primary in the purposes for which the Canal was constructed. However, we are not raising that point at this time. We are accepting as a compromise the $129,000,000 interest during the course of construction, and I might point in late Government accounting it has not been [fol. 124] the practice to include interest during construction, I understand, in the Tennessee Valley project or in the Grand Coulee Dam.

I am appearing in support of H. R. 8677—to reorganize Panama Canal Zone activities and establish fair and equitable transit tolls.

The bill is designed to implement recommendations of the Bureau of the Budget and of the President with respect to the organization and operation of the Panama Canal. In general, these recommendations—contained in House Document 460, Eighty-first Congress, second session—are designed to improve the organization of the Canal and to make readily available the necessary data from which to arrive at a proper basis for toll rates.

Under the bill, transit and business functions—that is, the Canal itself, the railroad, the steamship lines, the commissary, the hydroelectric system, mechanical division, wharves and piers, and so forth—would be operated on a business basis by the Panama Railroad Company, renamed the Panama Canal Company; and civil government func-

tions, including health and sanitation, would be performed by the Canal Zone Government. Tolls for commercial ships would be related to transit costs, including interest, depreciation, and a fair share of the net cost of health, sanitation, and civil government. Free transit of Government ships would be eliminated. The net appropriated cost of operation of the Canal Zone Government would be reimbursed to the Treasury by the corporation, reimbursement being properly charged to the various corporate divisions on an equitable basis.

Interest at going Government rates, on the capital of the Panama Canal Company, would be returned to the Treasury by that corporation. As an administrative matter each division thereof, including the transit division, would be expected to return the interest allocable to its capital. The Panama Canal Company's capital would consist of its present corporate capital, plus the fair commercial value of assets transferred to it, plus any future additions less any dividends, past or future, returned to the Treasury. Such capital would not include interest during construction now included on the Canal books.

Tolls would be set by the company directors from time to time on 6 months' notice and after public hearing and subject to the approval of the President.

The legislative history and background of the bill are set out in an exhibit entitled "Legislative History" which we offer for the record.

Senator Byrd. Very well, it will be inserted.

(The document referred to above is as follows:)

Legislative History

On February 28, 1949, the House of Representatives passed House Resolution 44 which provided in part for a full and complete study and analysis by the House Merchant Marine and Fisheries Committee or any authorized subcommittee, of the financial operation of the Panama Canal with particular reference to the proper accounting allocation of costs attributable to the transit of commercial and military vessels; military activities in the Canal Zone; and civilian government and business operations and to recommend to the Congress concerning proper and equitable toll policy.

The passage of House Resolution 44 grew out of the fact that in response to a suggestion contained in the report of the House Appropriations Committee on the Army civil functions appropriations bill for fiscal year ending June 30, [fol. 125] 1949, that Panama Canal tolls should be increased, the President, as recommended by the Department of the Army, issued a proclamation No. 2775, on March 26, 1948, increasing the applicable tolls from 90 cents to $1 per Panama Canal net ton.

When this appropriation bill (H. R. 5524) was before the Senate, representatives of the shipping industry and Members of Congress appeared before the Appropriations Committee and pointed out that adequate testimony was not made available to the Appropriations Committee of the House. Further testimony was given as to the effect of such a tolls increase upon American shipping, the lack of justification therefor, and other matters relating to this subject.

The report of the Senate Appropriations Committee, No. 1167, of April 23, 1948, contained the following statement on this subject:

"Shortly after the committee's hearing, and prior to its publication, the committee was advised that the Department of the Army submitted to the Chief Executive a proclamation, which was signed by the Chief Executive, increasing Canal tolls for laden vessels from 90 cents to $1 per ton to become effective October 1948.

"In view of the additional information and evidence on this matter developed at the committee's hearing, which was not available to the House committee, the committee strongly urges that the proclamation increasing the Canal tolls be reviewed, especially in the light of the adverse effect such an increase will have on American shipping."

On September 8, 1948, the President issued a proclamation in which he deferred the effective date of the toll increase previously authorized until April 1, 1949. Following the passage of House Resolution 44, the President, on March 14, 1949, again postponed the effective date of such a proposed increase in Panama Canal tolls by similar proclamation until September 1, 1949.

A special Panama Canal Tolls Subcommittee of the House Merchant Marine and Fisheries Committee was appointed pursuant to House Resolution 44 and conducted hearings on the subject at which the federation and other interested groups were heard. On August 23, 1949, the subcommittee filed its first interim report to the Congress (No. 1304). This report pointed out that an adequate analysis of the tolls problem could not be made until a study of the organization aspects of all phases of the Panama Canal, including the Panama Railroad, was made and recommended such a study. The President promptly directed the Bureau of the Budget to make the study and on August 25, 1949, pending the completion of the study, President Truman again postponed any increase in tolls until April 1, 1950.

The Bureau of the Budget made its report on January 31, 1950, and recommended: (We attach a copy of the Bureau of the Budget report and ask that it be made a part of the record.)

1. That in the organization of the Canal, transit and business functions should be separated from civil-government functions, and such transit and business functions should be operated by a compay to be known as the Panama Canal Company.

2. That tolls for commercial ships should be related to transit costs, including interest on Government investment.

3. That Government ships should pay tolls, too.

4. That the cost of dual-purpose activities at the Isthmus (schools, hospitals, etc., used by the military, civil government and transit personnel) should be proportionately charged to the military, civil government, and the Panama Canal Company.

The report failed to recommend, however, that a fair share of the capital cost of the Canal (upon which interest is now charged in the toll base) should be allocated to national defense in Canal accounts. While admitting the dual purpose and nature of the Canal—commerce and defense—and conceding them to be so nearly balanced that it is impossible to determine which purpose was primary, the budget report would assess interest on the entire capital investment in the Canal against transit tolls.

The President transmitted the Bureau of the Budget report to Congress on January 31, 1950, and endorsed all recommendations except one relating to the transfer of the Canal to the jurisdiction of the Secretary of Commerce, suggesting that that recommendation deserved further study On March 6, 1950, pointing out that implementation of the budget recommendation would take some time, the President again deferred any increase, this time until April 1, 1951.

[fol. 126] Except on the matter of capital structure, the report is reasonably fair and equitable, particularly in that it suggests as a matter of principle that all beneficiaries of Canal Zone operations should bear their just and fair share of the expenses of such operations, military, civil government, and ship transit, respectively, and recommends a practical arrangement for bringing this about.

As to capital structure, the federation considers that the defense value and functioning of the Canal are not recognized, and urges to this committee that a reasonable allocation of capital as well as operating costs should be made to national defense.

On August 16, 1950, the House Merchant Marine and Fisheries Committee, after study and extensive discussion with all interests, reported on H. R. 8677 with amendments. This bill had been introduced on May 31, 1950, and was designed to implement the Budget Bureau's recommendations. It was drawn by the Canal authorities and contained certain additional provisions which were deemed desirable by the Canal authorities in the interest of codification or of supplementing the budget recommendations. The committee deleted this codifying material.

The committee also added a compromise provision in order to make allowances for the defense value of the Canal. This compromise provision consisted of the elimination from Canal capital investment of so-called interest during the construction period which had been included by the Canal authorities in 1932 for the apparent purpose of supporting higher toll rates.

The bill also provided a maximum of $1 for the toll rate.

The bill, as reported with amendments, appears to be acceptable to the shipping industry and, except for the maximum limitation of toll rates, to the administration.

On August 24, 1950, it was passed by the House as reported by the committee.

Historical—Defense Considerations

The 10-year period preceding the granting of authority for the construction of the Panama Canal witnessed difficulties with Great Britain over the Venezuela-British Guiana boundary; the dispute with Germany over Venezuelan debts; the Spanish-American War (the race of the battleship *Oregon* around Cape Horn to join our fleet off Cuba, and the long voyage out to Manila Bay by Dewey); the Boxer Rebellion; and the strained relations with Japan over immigration. In each of these critical periods the United States Navy was divided between Atlantic and Pacific stations, and lack of a canal at Panama rendered any naval force behind Panama in each instance of little immediate value.

Considerations of this sort led Theodore Roosevelt to say in his message to Congress on Jauary 4, 1904, of the Panama Canal:

"Long acknowledged to be essential to our commercial development * * * has become, as a result of the recent extension of our territorial dominion, more than ever essential to our national defense. In the light of our present situation, the establishment of easy and speedy communication by sea presents itself not simply as something to be desired but as an object to be positively and promptly attained. Reasons of convenience have been superseded by reasons of vital necessity."

Numerous statements made by the Canal authorities at the time of the construction of the Canal, and subsequently, show that national defense considerations provided the major justification for the construction of the Canal. Col Harry Burgess, former Governor of the Canal Zone, writing in The Military Engineer, July-August 1929, stated:

"The French company * * * failed disastrously in executing the project. These facts being known, it seems improbable that the United States would have decided on the construction of the Canal solely from commercial considerations. The deciding factor was the value of the Canal as an element of the national defense."

General Goethals, who built the waterway, told a Senate committee in 1911:

"Assuming that the Panama Canal is a military necessity of the United States, I naturally take the military point of view that it is for the use of the fleet. I have always felt that the cost of building the Canal should be charged off the books as against the military defenses of the Union. * * *"

[fol. 127] The national defense value of the Canal was estimated in 1929 by Governor Burgess:

"In other words, for the United States to obtain without a canal the naval power—national safety insurance—equal to that of the present fleet with the Canal would require an increase of the naval force by 50 or 60 percent, with an increase in annual cost of about 40 percent. The naval expenditure in the fiscal year 1928 was about $320,000,000, and it would be fair to evaluate the defense insurance of the Canal as at least $125,000,000 per year."

And now, on January 31, 1950, in a report to the President of the United States, the Bureau of the Budget states:

"Whether any part of the capital cost of the Canal should be allocated to national defense presents a problem to which there is no positive answer. The Canal admittedly does serve a dual purpose—defense and commerce. However, any attempt to establish which purpose was primary at the time the Canal was built would be an utterly fruitless undertaking."

The total amount of tolls collected from commercial ships is about $20,000,000 per year. Government ships have in the past transited the Canal tolls-free.

Experience has borne out the wisdom of the Canal's construction as a defense facility. In his report the Governor of the Canal in 1947 wrote:

"Based on the volume of military traffic that transited the Panama Canal during the war years, an approximation has been made of the monetary saving that has accrued to the United States from its use. This saving which is estimated to be $1,500,000,000 is in shipping costs only, and does not represent the lives and material that were saved by a shortening of the war."

One and one-half billion dollars is approximately three times the capital investment in the construction and improvement of the waterway.

Concerning the financial operation of the Canal the Governor General stated in the same report to the Congress:

"During the period from 1914 to 1947, tolls and other revenues amounting to $587,137,000 were deposited in the Treasury of the United States, while the net appropriation expense for the same period was $315,956,000. If tolls at the prescribed rates had been paid on tolls-free vessels of the United States, it is estimated that the additional revenue would have amounted to not less than $64,000,000. Thus, the Panama Canal has returned to the United States in money or in free services the entire cost of maintenance and operation since its completion and, in addition, all but $74,000,000 of interest at 3 percent annually on the net capital investment."

In 1947, appearing before the Appropriations Committee of the House of Representatives, the Governor General of the Canal Zone made the following statement:

"* * * The Canal is a great international public utility serving the maritime commerce of the world; from its opening in 1914, to 1946, its revenues have been sufficient to pay all costs of operation and maintenance, including the costs of sanitation and civil government, and in addition to return approximately 2 percent of the net capital investment.

"These figures disregard the value of the Canal to national defense. It is safe to say that the services rendered by the Canal to the recent war effort were more than enough to repay the entire cost of maintenance and operation, but because of revenues of the Canal as a commercial enterprise, its cost as an adjunct to the national defense has been negligible."

The total investment of the United States in the construction and improvement of the Panama Canal to date amounts to about $500,000,000 as far as can be ascertained by published Government accounts. This figure appears to

include interest payments or accruals of more than $100,000,000 during the period of construction, and further very substantial payments made by the Department of State to the Republic of Panama in the period 1914-1920 under the Hay-Bunan-Varilla treaty. This is the treaty under which the United States concession to build the Panama Canal was obtained from the Republic of Panama. There is some question concerning whether this capital account for the Panama Canal includes certain military expenses connected with its defense during World War I.

[fol. 128] Chief Federal canals in the United States

[Data by Chief of Engineers, U. S. Army]

Canal	Location	Length	Rates	Cost (to date) expended by Army engineers
		Miles		
Cape Cod	Buzzards Bay to Cape Cod Bay	17.5	Free	[1]$31,425,550
Black Rock	East Bank at Niagara River, Buffalo	13.5	do	8,684,777
Chesapeake Delaware	Delaware River to Chesapeake Bay	16	do	14,454,447
Delaware-Rehoboth Bays	Delaware Bay to Rehoboth Bay	12	do	435,383
Intercoastal waterway	Norfolk, Va., to Jacksonville, Fla.	800	do	
Norfolk District				3,396,276
Wilmington District				9,401,800
Charleston District				7,345,888
Savannah District				763,599
Jacksonville District				263,659
				21,171,222
Florida waterway	Jacksonville, Miami	372	do	7,573,038
Intercoastal waterway	Apalachee Bay to Mexican Border		do	
Mobile District				5,832,168
New Orleans District				13,769,172
Galveston District				14,646,725
				34,248,065
Illinois and Mississippi	LaSalle, Illinois to Mississippi River	[2] 75	do	4,580,143
Illinois waterway	Lake Michigan to Mississippi River		do	26,407,302
Dalles-Celilo	The Dalles to Celilo Falls, Columbia River.	5	do	4,669,092
Lake Washington	Puget Sound to Lake Washington	8	do	3,539,295
"Soo"	Between Lake Huron and Lake Superior, U. S.	63	do	51,091,707

[1] Original purchase price $11,500,000.
[2] With feeder of 29.3 miles.

Suez and Kiel Canals

The Suez Canal is 104.50 miles long. Its construction was begun in 1859 and it was opened to traffic in 1869. The corporate investment in 1911 represented approximately $127,000,000. The canal is open to all nations and free from blockade by the Convention of Constantinople, signed in 1888.

The canal is operated by the Compagnie Universelle du Canal Maritime de Suez with its administrative seat in Paris. It is privately owned and its closely held shares, which sell at a 100 percent premium, are traded on the Paris Bourse. In 1875, Disraeli, then British Prime Minister, bought 176,602 of its shares from the Khedive Ismail of Egypt. Shares were numerically doubled in 1924 and His Majesty's Government, as of 1947, held 238,312 capital shares and 115,192 "jouissance" shares out of a total of 530,758 and 269,242 respectively.

The corporation has 32 directors, of which 10 are British, 2 Egyptian, 1 Dutch, 1 American, and 18 French.

In 1949 the Egyptian Government became a privileged partner in the Suez Canal under which it will receive 7 percent of the company's gross profits, with a guaranteed annual minimum of £350,000, and an increase in its directorate to seven.

In 1948, the canal earned over £11,000,000 (over $44,000,000). Annual dividends have been as high as 33 percent per annum of the cost of stock.

Rates of toll on the Suez Canal are 8 shillings (approximately $1.60 before devaluation, now approximately $1.12) per Suez Canal net ton.

The Kiel Canal in Germany cost that Government $132,000,000 prior to the war, and by the terms of the Versailles Treaty transit tolls on commercial vessels were limited to an amount which would cover operation and upkeep, an amount equal to about 6 percent of the amount presently charged at Panama.

The military aspects and value of the Panama Canal are obvious when it is noted that the Governor General of the Panama Canal is a general in the United States Army and under the supervision and direction of the Secretary of the Army.

[fol. 129] Financial History

Analysis of published accounts and reports on the Panama Canal by the National Federal of American Shipping show that:

(a) In the building, improvement, and operation of the basic Canal to date no charge has been made against national defense.

Once, in 1921, at the direction of the Secretary of War an amount of $113,000,000 was charged off to national defense. But in 1931 the profits of the Canal were such that the Canal authorities appeared to be concerned about sustaining the high toll rate. In 1932 the national defense capital was reincluded in the Canal accounts for interest purposes in the toll base, and in addition there was then added $120,000,000 of interest during the construction period.

(b) The financial accounts in the Government books have been and are being charged with interest at the rate of 3 percent per annum on funds advanced for the construction and improvement of the Canal not only during the entire period of its operation but during the construction period as well.

(c) The Canal accounts show substantial charges for sanitation, hospitals, public parks, and playgrounds, which appear to be civic or civil government expenses, at least in part, and which are partly attributable to military, naval, railroad, diplomatic or private interests in the Canal Zone.

(d) United States Government vessels have been furnished free transits which at the prevailing commercial rate have a total value of over $64,000,000.

(e) Inadequate reimbursement is received from the Army, Navy, and other activities for certain functions performed for them by the Canal authorities.

(f) Some revenues which otherwise would accrue to the Canal are paid over to an account called business operations and the Panama Canal Railroad, both of which show separately reported profits.

(g) If interest on United States funds be excluded, transit tolls paid by commercial vessels, plus tolls forgiven on Government vessels, have exceeded all construction and

improvements costs and all operating costs transit purposes by about $2,000,000.

(h) Panama Canal toll policy has not been consistent with the policy adopted for all other waterways in North America. On the 12 principal waterways of the United States, including the Soo and Cape Cod Canals, and on Canadian Welland Canal, no transit tolls are charged to either domestic or foreign shipping.

As an example of military expenses now charged to shipping, recurring statements in the reports of the Governor General of the Canal show that substantial increases in expenses of numerous activities of the Canal have been directly attributable to the increases in the number of military and naval personnel located at the Canal. In the annual report of the Governor for fiscal 1940, for example, it is stated:

"In the foregoing table it may be seen that there has been a net increase of 1,747 in the number of gold employees in the rolls of the Panama Canal and the Panama Railroad Company. This is an increase of practically 50 percent, and with a few minor exceptions, it may be seen in every unit of the organization. *This is the direct result of the great volume of construction activity now being carried on locally in national-defense programs.* * * * Because of the general increase in activity it has likewise been necessary to increase the force in numerous other units not actually engaged in construction, such as the accounting department, the health department, and the commissaries." [Emphasis supplied.]

This statement is reiterated in the 1941 report of the Canal.

In his annual report for 1941, the Governor of the Canal showed that the expense of schools in the Canal Zone was largely attributable not to shipping, but to the military forces in the Canal Zone. He stated:

"During the past year careful surveys were made of the plans for the expected increase in population of the Canal Zone, both in military forces and in civilian forces engaged in construction activities. The school administration keeps informed as to the anticipated changes and rearranges and

plans for the expansion of educational facilities in accordance with such changes."

In the same report he stated:

"The recreational facilities provided by the playground section are used extensively not only by the civilian employees and their families, but also by the United States defense forces stationed on the Isthmus. Practically all [fol. 130] facilities are utilized to their capacity during visits of units of the United States Navy."

The Governor, in his report for 1940, stated of expense for the expansion and improvement of hospital facilities at Gorgas Hospital:

"The increase in the Army and Canal Zone personnel makes the alteration and installation of necessary facilities imperative for adequate hospitalization."

Certain portions of the Canal, like the width and depth of locks at certain points, have been constructed, maintained, and operated only because they are necessary to accommodate the beam and draft of certain war vessels, and yet the entire expense of their operation and maintenance is included in the net annual appropriation which, as stated in the accounts of the Canal, "are considered as provided from the tolls and other receipts covered into the Treasury" (Governor's report, 1946, p. 94).

We suggest that a fair allocation of these expenses unrelated to the operation of the Canal should be made, and that tolls and other revenues should pay the remaining expenses of the Canal authorities.

Mr. Bailey. Now, with regard to section 7, the damage claims we have no objections to the reinclusion of section 7.

I would like to say that the federation's policy supports this bill. It does not support free tolls at Panama, nor do we contend for preferential tolls to American shipping. The shipping interests which we represent believe that the Panama Canal should be placed upon a pay-as-you-go basis after full consideration of its military and its commercial characteristics. We do not believe the American taxpayer should be called upon to provide funds for the oper-

ation of the Panama Canal for commercial transit purposes. We believe the Canal should be self-sustaining from its toll receipts as to all expenses incurred in its operation for transit purposes. We do not believe that Government or military ships should be afforded free transit, as they have in the past, and that the toll burden should be placed solely upon commercial vessels. It has been demonstrated that, in the past, substantial portions of military and civil government expenses have been included in the accounts of the Canal and have strongly influenced the Canal toll policy. It is admitted by all parties that the Canal was built for the dual purpose of national defense and commercial transits. We offer for the record an exhibit which has been prepared showing the defense considerations involved in the Canal's construction.

We urge that there be, and the bill provides for, a recognition of the military value of the Panama Canal in its toll policy, and thereafter it should operate without loss or without profit. That part of the shipping industry which we represent is prepared to pay its full proportionate share of all expenses directly connected with commercial transits. It does not feel that it should pay any part of military or civil government expenses which are incurred on the Canal Zone.

Panama Canal tolls are a substantial expense item in shipping. Especially is thus true in the case of our domestic lines which use it most frequently. These are our American shipping services in greatest need of relief. The cost of an 8-hour transit through the Panama Canal is approximately $6,600 for a C-3 freighter—more than $800 per hour. American shipping pays annually approximately $10,000,000 in Panama Canal tolls. On an intercoastal round trip, toll charges for a C-3 freighter are approximately equal to 1 month's basic wage bill of the vessel.

The Panama Canal is not the only canal project for the transit of vessels which has been constructed and is being operated by the United States Government. Without going [fol. 131] into the question of the maintenance of harbors, rivers, and other navigable waters there may be cited as representing substantial investment by the United States in

canal projects for vessel transit purposes, the attached list of canals built and maintained by the United States the aggregate cost of which, it is noted, is in excess of $208,000,000. No toll charge has been suggested up to this time to cover the transit of these waterways by water-borne craft. We do not say this as a suggestion of free tolls at Panama. We only state it to show that it is not unusual for the Government to provide canal transit facilities.

The Canadian Government constructed the Welland Canal between Lakes Erie and Ontario, at a cost of approximately $132,000,000. On these waterways no transit tolls are charged to either domestic or foreign shipping. We have also prepared for the record a brief statement on the Suez and Kiel Canals, which we offer.

The rates of transit tolls at Panama are set by the President under a delegation of authority from Congress authorizing rates between certain minimum and maximum amounts. The President acts upon the recommendation from the Department of the Army. At the present time, rates of toll are 90 cents per net Panama Canal ton for laden vessels and 72 cents per net Panama Canal-ton on vessels transiting in ballast. The United States and Panamanian Government vessels and warships of the Republic of Colombia transit the Canal toll-free. All other ships of all other nations pay the established rates of toll.

Canal revenues from tolls, civil revenues, and net profits on business operations are covered into the Treasury. Funds for current operating expenses and capital construction are appropriated by Congress and for accounting purposes are considered as provided from, or as an offset against, the tolls and other receipts covered into the Treasury. Practically all receipts other than tolls, civil revenues, and business profits—that is, receipts like rent of quarters, hospital receipts, and so forth—are repayable to Canal appropriations and may be reexpended, but the reexpendable receipts are insufficient to provide for over-all costs, and the Canal is therefore required to submit its expenditure program annually to the Congress.

For the past 3 years the subject of Panama Canal tolls has been under study by congressional committees, executive departments, this federation, and others. We will not burden the record with repetition of detail data already

disclosed by these investigations. The detail is available in the printed records of the respective committees, which we respectfully suggest be incorporated herein by reference.

In general these studies have shown:

(a) That a reorganization of the Canal is desirable and necessary to provide a business-type operation and the data upon which to base toll rates;

(b) That notwithstanding the Canal's value as a national-defense asset, and notwithstanding the defense purposes which motivated its construction, and the defense savings which it has effected in war and in peace, no part of the capital cost of building or improving the basic Canal has been or is being charged to national defense in its present accounts. Interest on the entire capital investment is included in the Canal accounts which form a basis for commercial tolls;

(c) That very substantial operating expenses for schools, hospitals, highways, sewers, cemeteries, and so forth, for [fol. 132] the military and others are not reimbursed, or are not adequately reimbursed, by the military and others. Substantial sums representing the cost of operation and maintenance of these facilities are included in the accounts which form the present basis for Canal tolls;

(d) That Government vessel transits which constitute about 10 percent of all vessel transits in peacetime are entirely toll-free, the expense of the facilities which perform such transits being charged into the Canal accounts where they become a part of the commercial tolls base.

One of the studies conducted by the special subcommittee appointed to investigate Panama Canal tolls under House Resolution 44, Eighty-first Congress, first session, recommended:

That the President be requested to cause a study to be made of the organizational aspects of all phases of the Panama Canal including the Panama Railroad, and that his recommendations of suitable changes be furnished to the Congress. Inasmuch as the problem has recently been considered by the General Accounting Office and the Bureau of the Budget, it is believed that this study may be con-

cluded within the present calendar year, and, in any event, not later than January 31, 1950.

The President ordered such a study and has repeatedly deferred any tolls increases pending consideration of the recommendations by Congress.

On January 31, 1950, the Bureau of the Budget reported to the President and the President approved and transmitted to Congress a report and recommendations designed to eliminate some of the present inequities. The report recommended (a) that in the organization of the Canal, transit and business functions should be separated from civil government, health and sanitation functions and such transit and business functions should be operated by a "Panama Canal Company" on a business basis; (b) that the military and other recipients of services and facilities from the Canal Company and from the civil government should pay for the services and facilities at prices designed to reimburse cost; (c) that in lieu of taxes the net cost of health, sanitation and civil government should be borne by the Panama Canal Company on the basis of gross revenues; (d) that government vessels should pay tolls; (e) that the Panama Canal Company should be charged with interest on capital investment at a rate designed to reimburse the Treasury for its cost; that is, about 2.3 percent at the present time; and (f) that tolls should be set at rates calculated to cover the cost of operation and maintenance of the Canal, depreciation, interest on capital investment and the Canal's share of the net cost of health, sanitation, and civil government.

As amended, and as now before this committee, H. R. 8677 has been designed to implement these recommendations. The bill, as reported by the House, also gives reasonable recognition to the defense purposes of the Canal by providing for the write-off of an item of dubious validity now included in Canal capital, namely, interest during construction in an amount of $129,000,000. There is precedent in TVA accounts for not including interest during construction, TVA being the multipurpose government corporation most similar to the new Canal Company.

Some additional comment on the House item of interest during construction will be helpful to your committee. In 1921 a commission appointed by the Secretary of War—

which certainly would be sympathetic to the military side [fol. 133] of the case— allocated an amount of $113,000,000 of the capital investment to national defense. The findings of this Commission were in effect nullified by administrative action in 1932 when this national defense deduction was reincluded in the Canal capital account, and to which was also added $129,000,000 of "interest during construction."

The item itself is computed by compounding interest at 3 percent from date of each appropriation until the date of the official opening of the Canal.

Even with the deletion of this item from the capital base the Canal transit operations will return approximately $7,000,000 per annum in cash as interest to the Treasury and will contribute approximately $4,000,000 to the net cost of health, sanitation, and civil government under the bill. The Bureau of the Budget has indicated that the compromise deletion of this amount is acceptable.

The United States shipping industry as represented by the Federation is quite prepared to pay tolls for the transit of commercial ships based upon the cost of performing the service under good accounting practices and including interest at rates suggested by the Bureau of the Budget on a capital investment as provided in the bill. We are not suggesting that the taxpayers of the United States provide funds to defray the cost of transiting commercial vessels. We do object to having this traffic burdened with military and other expenses unrelated to commercial transits and the bill covers that satisfactorily.

A policy of setting toll rates at amounts which would cover the cost of operation of the Canal and all services reasonably accessory thereto would be fair and equitable to shipping and to the Government, and an aid to the American merchant marine. Such a policy would be of particular assistance in the intercoastal trades which are having a difficult fight for revival.

Before World War II as many as 145 dry-cargo ocean-going steamships under private ownership plied these routes and constituted a substantial segment of American shipping.

Due to changed economic conditions American shipping companies have not found it possible to restore these serv-

ices except in a small way. Today only 40 privately-owned vessels—compared with 145 in 1-39—are operating between these ports.

The setting of tolls in acordance with H. R. 8677 would not result in any burden on the United States for the operation and maintenance of the Panama Canal and its necessarily related activities. It would simply amount to a fair recognition of its national security characteristics, and a proper reduction of the costs heretofore, in our opinion, improperly assessed against commercial shipping.

We urge prompt passage of the bill in the interest of expediting this highly desirable reorganization and in order that a fair and equitable tolls policy may be fixed by Congress.

The Merchant Marine and Fisheries Committee of the House stated of the legislation:

Your committee believes that legislation reorganizing the Panama Canal and establishing tolls policy has long been needed. Since it will require at least a year to effect the changes proposed by the bill, it is recommended that this legislation be given early consideration.

That comprises my statement.

Senator Byrd. The total cost was $534,000,000?

Mr. Seidman. Total capital investment at the present time.

[fol. 134] Senator Byrd. Does that include interest?

Mr. Seidman. During construction. I want to clarify one point of interest during construction. The interest during construction has been computed on a compound interest basis. The General Accounting Office has criticized that as being unsound. You do not compute interest during construction on a compound basis, and they have recommended that be computed on a simple interest basis.

I can give you the figure. I think this is a more realistic figure of what we are taking out. Interest during construction, as recomputed or recalculated by the General Accounting Office on a simple interest basis, is $115,000,000.

So actually what we are taking out from the investment base is $115,000,000 rather than $129,000,000.

Senator Byrd. That would leave $419,000,000 on which you would collect interest?

Mr. Seidman. No. They would be taking out the investment in civil Government facilities. They have been collecting interest on schools, hospitals, and civil government structures. Those would be taken out of the investment base. The capital investment subject to interest—again, these are a guess—if you took out interest during construction, it would be somewhere around $325,000,000, on which you would be paying interest.

Senator Byrd. $325,000,00-?

Mr. Seidman: That is a very rough guess.

[fol. 135] Calendar No. 2535

81st Congress, 2d Session Report No. 2531

SENATE

AUTHORIZING AND PROVIDING FOR THE MAINTENANCE AND OPERATION OF THE PANAMA CANAL BY THE PRESENT CORPORATE ADJUNCT OF THE PANAMA CANAL, AS RENAMED; TO RECONSTITUTE THE AGENCY CHARGED WITH THE CIVIL GOVERNMENT OF THE CANAL ZONE, AND FOR OTHER PURPOSES.

September 8 (legislative day, July 20), 1950.—Ordered to be printed

Mr. Byrd, from the Committee on Armed Services, submitted the following

REPORT

[To accompany H. R. 8677]

The Committee on Armed Services, to whom was referred the bill (H. R. 8677) to authorize and provide for the maintenance and operation of the Panama Canal by the present corporate adjunct of the Panama Canal, as renamed; to reconstitute the agency charged with the civil government of the Canal Zone, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill, as amended, do pass.

[fol. 136] Purpose of the Bill

The purpose of this bill, as amended, is to improve the organization of the Panama Canal and to establish an equitable and proper base for the collection of tolls.

Explanation of the Amendments

With one exception, all of the amendments listed above are technical or clarifying in character and do not change in the slightest degree the substance of the proposed legislation.

The new section 3 which has been inserted is very lengthy but is a technical amendment to make certain that the bill contains a proper provision for the payment of damages and claims in the event of injuries for which the Panama Canal Company is liable. This amendment is almost identical with the present law with the exception that the limit on the amount of payment which is contained in the present law has been removed. One amendment of substance has been made by the committee. The House wrote in an amendment which would have placed a limit of $1 per net vessel-ton on the rate of tolls which could be charged. Such a limitation is entirely inconsistent with the principles of this legislation, since the bill establishes a method of calculating tolls at such a level as will make the Panama Canal self-supporting. The institution of an arbitrary ceiling could quite readily result in the Canal being forced to operate at a loss.

Explanation of the Bill, As Amended

Basically, the primary purpose of the bill is to separate the business operations of the Panama Canal from those collateral operations which make up the governmental activities of the Panama Canal administration. Tolls will be calculated in accordance with a formula written into the law which will result in the operation of the Canal on a self-sustaining basis. Interest will be charged at a going rate which is approximately 2.3 percent at the present time on the capital investment in the Panama Canal and this interest must be paid into the Treasury of the United States. In addition to paying for the cost of operating and maintaining the Canal, it is estimated that about 50

percent of the cost of the civil government would be supported by the tolls collected from transit vessels. The remainder of the cost of the civil government would be borne by the other business activities, such as hotels, commissaries, etc. As a result, the Canal will be on a self-sustaining basis and the other collateral businesses operating in the Canal Zone must bear their proportionate share of the cost of the civil government, health, and sanitation.

Several changes have been made in the formula used in calculating tolls. For the first time transit military and Government vessels will be charged when they pass through the Canal. This will not be an actual payment but will be a credit on the books of the Canal Company. In addition, subsection E of section 412 of the Canal Zone Code has been amended to provide that interest on construction costs shall be eliminated in calculating tolls. This principle is the same as is followed by the Tennessee Valley Authority in fixing their rates for power, and other similar Government projects. This means that the Government con- [fol. 137] tinues to include the Panama Canal as one of the capital assets of the United States of America. It is valuable as part of the national defense of our country and has proved itself as an asset for commercial purposes. By so recognizing the national defense aspects, interest on construction costs can be deducted from current maintenance charges for the purpose of fixing tolls.

It is believed that once these changes are made there can be, for the first time, an accurate assessment of the business affairs of the Company, and it will be unique in the Government service in that a corporation will be paying interest into the Treasury and at the same time operating on a self-sustaining basis. The committee inquired into the effect of this legislation on the existing tolls which are now set at 90 cents a vessel-ton, as well as the amount of interest that would be paid into the Treasury under the new bill. This interest figure is of particular significance because little or no interest on capital investment has been paid into the Treasury under the old law.

Testimony of the representatives of the Bureau of the Budget indicated that under prevailing conditions the application of the provisions of this bill, as amended, would

probably result in a tolls rate of about 95 cents per net vessel-ton.. This is derived from the following data:

Revenue	
Commercial tolls	$24,000,000
Government transits, (now exempt)	2,500,000
Other outside revenue	2,300,000
Total	28,800,000

Expense	
Expense	18,500,000
Allocation of proportionate share of cost of Canal Zone Government	3,700,000
Interest (to be paid into Treasury)	8,000,000
Total	30,200,000

Net loss at 90 cents a ton rate, $1,400,000.

An increase of tolls to 95 cents a ton would produce additional revenues of $1,400,000 a year if Canal traffic averages 28,000,000 tons a year as at present.

All of the above figures are stated in round numbers and are based on currently available financial data. The toll rate will, of course, be affected by any future changes in operating costs, interest rates, and Canal traffic and may be revised either up or down.

This bill is recommended by the Department of Defense and the Secretary of the Army in his capacity as the presidential representative in administering the Panama Canal, as is shown in the following letter from the Secretary to the chairman of the Senate Armed Services Committee, the Bureau of the Budget, the Governor of the Panama Canal, the Steamship Owners Association, and, with the amendment removing the arbitrary ceiling, the Association of American Railroads.

[fol. 138] Chapter 23.—Tolls for Use of Canal

411. Authority [of President] to Prescribe [and Change] *Measurement Rules and* Tolls.—The *Panama Canal* Company is authorized [subject to the provisions of the section

next following] to prescribe and from time to time change *(1) the rules for the measurement of vessels for the Panama Canal, and (2), subject to the provisions of the section next following,* the tolls that shall be levied [by the Government of the United States] for the use of the Panama Canal [, but no tolls when prescribed as above shall be changed unless six months' notice is given by the President by proclamation.] *: Provided, however, That the rules of measurement, and the rates of tolls, prevailing on the effective date of this amended section shall continue in effect until changed as provided in this section: Provided further, That the said corporation shall give six months' notice, by publication in the Federal Register, of any and all proposed changes in rates of tolls, during which period a public hearing shall be conducted: And provided further, That changes in basic rules of measurement and changes in rates of tolls shall be subject to, and shall take effect upon, the approval of the President of the United States, whose action in such matter shall be final and conclusive.*

412. Bases of Tolls [; Maximum and Minimum Rates].

—(*a*). Tolls on merchant vessels, army and navy transports, colliers, *tankers*, hospital ships, supply ships, and yachts shall be based on net vessel-tons of one hundred cubic feet each of actual earning capacity determined in accordance with the [Rules] *rules* for the [Measurement] *measurement* of [Vessels] *vessels* for the Panama Canal, [prescribed by the President and as may be modified by him from time to time by proclamation,] and tolls on other floating craft shall be based on displacement tonnage. [Provided, That the basic rules of measurement shall not be changed except after public hearing and six months' public [fol. 138a] notice of such change. The rate of tolls on laden vessels shall not exceed, $1 nor be less than $0.75 per net vessel-ton as determined under the aforesaid rules, and] *The rate of tolls* on vessels in ballast without passengers or cargo [the rate] may be less than the rate of tolls for vessel with passengers or cargo. [In addition to the tolls based on measurement or displacement tonnage, tolls may be levied on passengers at rates not to exceed $1.50 for each passenger.]

(b) Tolls shall be prescribed at a rate or rates calculated to cover, as nearly as practicable, all costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto, including interest and depreciation; and an appropriate share of the net costs of operation of the agency known as the Canal Zone Government. In the determination of such appropriate share, substantial weight shall be given to the ratio of the estimated gross revenues from tolls to the estimated total gross revenues of the said corporation exclusive of the cost of commodities resold, and exclusive of revenues arising from transactions within the said corporation or from transactions with the Canal Zone Government.

(c) Vessels operated by the United States, including warships, naval tenders, colliers, tankers, transports, hospital ships, and other vessels owned or chartered by the United States for transporting troops or supplies, may in the discretion of the President of the United States be required to pay tolls. In the event, however, that such vessels are not required to pay tolls, the tolls thereon shall nevertheless be computed and the amounts thereof shall be treated as revenues of the Panama Canal Company for the purpose of prescribing the rates of tolls, and shall be offset against the obligations of the said corporation under paragraphs (c) and (e) of section 246 of this title, as amended.

(d) The levy of tolls is subject to the provisions of section 1 of article *III of the treaty between the United States of America and Great Britain concluded on November 18, 1901, of articles XVIII and XIX of the convention between* the United States of America and the Republic of Panama [entered into] *concluded on* November 18, 1903, and of article I of the treaty between the United States of America and the Republic of Columbia proclaimed on March 30, 1922.

(e) Capital investment for interest purposes shall not include any interest during construction.

[fol. 139] EXHIBIT "E" TO MOTION

First Annual Reports of the Panama Canal Company and the Canal Zone Government for the Fiscal Year Ended June 30, 1952

[fol. 140] INTRODUCTION

The Waterway

The Panama Canal is a lock-type canal that connects the Atlantic and the Pacific Oceans through the Isthmus of Panama, traversing a distance of approximately 51 miles from deep water to deep water. In the dredged channel the canal has a minimum width of 300 feet and a minimum depth of 42 feet. The greatest part of the canal channel is at the level of Gatun Lake, the surface of which is 85 feet above sea level. In transiting the canal a ship is raised in three steps or lockages to the level of Gatun Lake and subsequently lowered in 3 steps to sea level at the other side of the isthmus. Each of the twin chambers in each flight of locks has a usable length of 1,000 feet and width of 110 feet, and is about 70 feet deep. The flights are in duplicate, enabling ships to be passed in opposite directions simultaneously.

The Company

The Panama Canal Company which now operates the Panama Canal and its related business-type activities is a corporate agency of the United States created (reincorporated) as the Panama Railroad Company by Public Law 808, 80th Congress, enacted June 29, 1948, and renamed under the provisions of Public Law 841, 81st Congress approved September 29, 1950. The original Panama Railroad Company, chartered in 1849 under the laws of the State of New York, had been acquired by the United States Government through the purchase of the assets of the new Panama Canal Company from the French in 1904.

Effective July 1, 1951, under the provisions of Public Law 841, and pursuant to Executive Order 10263 of June 29, 1951, the maintenance and operation of the Panama Canal and the facilities and appurtenances related thereto were assumed by the Panama Canal Company by transfer from the noncorporate agency known as the Panama Ca-

nal. That agency was renamed the Canal Zone Government, and is charged now exclusively with the functions of civil government, which include responsibilities for health, sanitation, and protection of the Canal Zone. The Company and the Canal Zone Government are closely interrelated in purposes, organization, and operations, and the function of the two agencies in combination is the administration of the Panama Canal enterprise as a whole. The Canal Zone is required by law to be held, treated, and governed as an adjunct of the Panama Canal. The Governor of the Canal Zone who is charged with the administration of the Canal Zone Government, under the supervision of the Secretary of the Army, is ex officio a director and president of the Panama Canal Company.

Under Public Law 841 the Company is required to be self-sustaining and to reimburse the United States Treasury for the net cost of administering the Canal Zone Government and, as nearly as possible, for the interest on the net direct investment of the United States in the corporation. [fol. 141] The interest rate for the fiscal year 1952 was set by the Secretary of the Treasury in conformity with law at 1.95 percent. The law also authorized appropriations to cover losses sustained in the conduct of the Company's business as well as appropriations in the form of interest-bearing advances for capital needs.

The management of the Company is vested in a board of directors appointed by the Secretary of the Army in his capacity as stockholder, and is charged with the maintenance and operation of the Panama Canal and the conduct of auxiliary operations incident thereto and incident to civil government of the Canal Zone.

In this report and for accounting purposes generally, the activities of the Company are classified under four major headings, namely: (*a*) canal activities; (*b*) commercial activities; (*c*) employee service activities; and (*d*) other service activities. Canal activities comprise those functions directly related to the waterway and transiting of ships, such as the marine operation, maintenance of the canal channel, operation and maintenance of the locks, meteorology and hydrographic work, and ferry service across the canal at Balboa. Commercial activities consist of a railroad across the isthmus, marine bunkering facili-

ties, a hotel, a steamship line operating between New York and the Canal Zone, and cargo-handling activities, including operations of the docks and piers. Employee service activities are those essential to employees' needs and which were established primarily for that purpose; they consist of the operation of quarters, commissaries, and so-called clubhouses. Other service activities are those established primarily for serving the needs of the Company but which may also serve employees, other agencies, and the public; they include industrial shops and drydocks, construction and maintenance units, motor-transportation facilities, printing plants, storehouses, the electric power, water, and telephone systems, garbage collection, and transient quarters for those having official business on the isthmus (Tivoli Guest House).

[fol. 142] EXHIBIT "F" TO MOTION

83d Congress, 2d Session House Document No. 476

Second Annual Reports of the Panama Canal Company and the Canal Zone Government for the fiscal year ended June 30, 1953

[fol. 143] Summary of Financial Results

The financial report and financial statement for the year ended June 30, 1953, appear in chapter V. It has been necessary again this year to report the properties transferred from The Panama Canal (agency) on July 1, 1951, the Government's equity therein, and the corresponding depreciation and interest accruals at tentative amounts which may be substantially changed upon the completion of the plant inventory and appraisal program currently underway. While traffic passing through the canal exceeded that of any year in the canal's history, it must be remembered that it was stimulated by the effects of war in Korea, rearmament at home and abroad, and other abnormal world conditions arising from international tensions such as the abnormal flow of petroleum stemming from the shutdown of Iranian production. This caused a substantial increase in revenues for 1953. As a result, the excess of revenues over expenses as presently com-

puted increased and has been tentatively figured at $7.2 million dollars after provision for interest and all other obligations of the Company. It is estimated that this figure will be reduced to approximately $5.6 million when full effect is given to evaluation adjustments now in the course of development.

[fol. 144] EXHIBIT "G" TO MOTION

84th Congress, 1st Session House Document No. 108

Third Annual Reports of the Panama Canal Company and the Canal Zone Government for the Fiscal Year Ended June 30, 1954

[fol. 145] The Panama Canal Company is expected *(a)* to recover all costs of operation and maintenance of its facilities, including depreciation, *(b)* to pay interest to the Treasury on the net direct investment of the Government in the Company, and *(c)* to reimburse the Treasury for (1) the annuity payments to the Republic of Panama under the Convention of 1903 as modified by the Treaty of 1936 between the two Governments, and (2) the net costs of operation of the Canal Zone Government including depreciation on fixed assets. The interest rate for the fiscal year 1954, as set by the Secretary of the Treasury, was 2.342 percent. The Board of Directors is required to appraise, at least annually, the Company's working capital requirements, together with reasonable foreseeable requirements for authorized plant replacement and expansion, and to pay into the Treasury as a repayment of capital the amount of any funds in excess of such requirements. All funds other than working balances are carried with the United States Treasury.

In this report and for accounting purposes generally, the activities of the Company are classified under two major headings, namely: (1) the Canal and allied maritime operations, and (2) supporting operations. Category (1) embraces those functions directly related to the waterway and the transiting of ships and to services to shipping, including maintenance of the canal channel, maintenance and operation of the locks, meteorology and hydrographic serv-

ices, a ferry service across the canal at Balboa, vessel repairs, harbor terminal operations, and the operation of the Hotel Washington. The supporting operations include a railroad across the isthmus, a steamship line operating between New York and the Canal Zone, motor transportation facilities, storehouses, an electric power system, a water system, a communication system, and service activities that are essential to employees' needs including the operation of quarters, commissaries, and service centers.

[fol. 146] Nationality of Vessels Transiting Canal

Thirty-three nationalities were represented in the oceangoing commercial traffic passing through the canal in the fiscal year 1954, one less than in the preceding year. Vessels of United States registry, accounting for 11,613,431 net vessel tons, again ranked first among the various flags represented in the transit statistics. Vessels of British registry traditionally rank second in importance in canal traffic and retained that position in 1954, with net vessel tonnage totaling 7,330,847. Traffic of both these two leading maritime nations was under the 1953 figures.

United States vessels made up 30.5 percent of the total net tonnage during fiscal year 1954; British, 19.3 percent; Norwegian, 10.5 percent; Panamanian, 7.2 percent; Japanese, 5.7 percent; Danish, 3.1 percent; Swedish, 2.8 percent; Liberian, 2.7 percent; and Italian, 2.7 percent.

Further particulars on traffic by nationality will be found in table 13, chapter V, page 62.

[fol. 147] Bills Pending

Bills pending in the Congress as of the close of fiscal year 1954 that would apply to the Canal Zone generally or to the Canal Zone Government or Panama Canal Company (other than appropriation bills and bills that, because of their provisions, have general application to the Canal Zone and/or to the Canal agencies) included the following:

A bill (H. R. 9665) that would provide for amendment of tolls section 412 (b) of title 2 of the Canal Zone Code, and addition of section 246 (f) in said title in order to provide for the amortization and depreciation of fixed assets transferred to the Corporation that were treated as nondepreciable prior to July 1, 1951.

A bill (H. R. 9583) that would repeal section 412 (c) of title 2 of the Canal Zone Code, in order to include interest during construction in capital investment for interest purposes.

Two bills (H. R. 9427 and H. R. 9681) that would amend sections 246, 247, and 412 of title 2 of the Canal Zone Code, in order to reduce the overall burden of the Company (and thus the burden borne by tolls) in several important respects.

Two identical bills (H. R. 9429 and H. R. 9433), that would amend section 412 (b) of title 2 of the Canal Zone Code (that tolls section) so as to redistribute the corporate burden internally in order to shift a relatively larger portion of the burden on the tolls activity, and, correspondingly, to decrease the portion of overall obligations which is to be borne by other activities of the Company.

[fol. 148]

CHAPTER V

Financial Report and Statistical Data

Financial Report for Fiscal Year Ended June 30, 1954

The financial statements of the Panama Canal Company, appearing in tables numbered 1 through 10, fairly present the financial position of the Company at June 30, 1954, and the results of its operations for the fiscal year then ended in accordance with generally accepted accounting principles, subject to the qualifications appearing in the notes accompanying the statements.

Certain assets, liabilities, and related net direct investment of the Government acquired by transfer from the former Panama Canal agency on or prior to July 1, 1951, are in process of valuation as required by law. The work is nearing completion and it is believed that all major valuation adjustments, except possibly those relating to excess inventories and liability for alien cash relief, have been reflected in the accounts. It must be recognized, however, that further adjustments will be made and that the entire valuation is subject to final review and approval by the Board of Directors and the Director of the Bureau of the Budget. Any changes in these valuations will affect

the provisionally reported depreciation and interest accruals and net income for the period since July 1, 1951.

In addition, there has been submitted to the Congress by the Company certain draft legislation which, if enacted, would further change depreciation, amortization, and interest requirements of the Company retroactive to July 1, 1951. Under existing legislation, the cost of the canal channel, capitalized interest during construction, and certain other costs of fixed assets are not subject to allowance for depreciation or amortization. The proposed legislation would authorize and require such depreciation or amortization and, in addition, would include the amount of interest during construction in the interest-bearing investment of the Government.

The Company's accounting practices for fiscal year 1954 are generally consistent with those of the preceding year, except that (1) administrative and certain other general expenses previously allocated to operating expenses are now considered general corporate charges and are not distributed in the accounts, (2) the principle of group depreciation allowances was adopted under which gain or loss is not generally recognized on retirement of individual items of property, and (3) new rates of depreciation were adopted for various classes of plant as a result of the valuation study.

Government's Investment

The property valuation and working capital adjustments recorded during the year as a result of the appraisal program have served to increase the tentatively stated net direct investment of the Government from $376,204,276, as reported last year, to $377,764,946.

[fol. 149] The net effect of these adjustments, and others made during fiscal years 1952 and 1953, on the assets and liabilities transferred from the Panama Canal (agency) appear on table 10. The principal revisions made during 1954 are summarized as follows:

	Increase (decrease) in net direct investment
Net increase in working capital	$973,540
Net increase in fixed assets:	
Gross plant:	
Improvements to canal channel through June 30, 1951 (previously charged to operations)	34,097,996
Reclassifications of plant and equipment from defense and idle plant to plant in service	8,242,252
Other miscellaneous adjustments to plant in service	754,501
Total increase in gross plant	43,094,749
Allowance for depreciation and economic valuation:	
Establishment of 100 percent allowance for economic valuation against capitalized interest during construction	(50,892,311)
Reduction in depreciation accumulated to June 30, 1951, to give effect to revised service lives and use of mortality methods of calculation	11,283,917
Allowance for depreciation on plant and equipment reclassified from defense and idle plant to plant in service	(2,109,850)
Other miscellaneous adjustments to allowance for depreciation and economic valuation	(789,375)
	(42,507,619)
Net increase in fixed assets	587,130
Net increase in direct investment	1,560,670

As shown on table 10, the net effect of the foregoing adjustments was to increase the interest-bearing portion of the Government's investment by $52,452,981. The investment in capitalized interest during construction, for which a 100 percent valuation allowance was established in 1954, was not interest bearing, under the provisions of section 412 (e) of title 2 of the Canal Zone Code, as amended.

[fol. 150]

TABLE 2.—ANALYSIS OF EQUITY OF U. S. GOVERNMENT, JUNE 30, 1954 AND 1953

	1954	1953
NET DIRECT INVESTMENT:		
Capital stock of original Panama Railroad Company (N. Y.)	$ 7,000,000	$ 7,000,000
Tentative valuations of properties and other assets, less liabilities, transferred from the Panama Canal (note 1):		
Car shops and roundhouses, Feb. 1, 1950	190,651	232,182
Oil plants, docks and piers, July 1, 1950	5,579,441	3,015,582
Canal and other facilities, and net working capital, July 1, 1951	400,749,715	401,711,373
Tentative transfer valuation (table 10)	406,519,807	404,959,137
Gross direct investment, as tentatively stated, June 30, 1954 and 1953	413,519,807	411,959,137
Less dividends and other charges deductible from direct investment:		
Dividends paid to U. S. Treasury, 1904 to 1950 (note 6)	23,994,905	23,994,905
Appraised value of lands conveyed to Republic of Panama without reimbursement, Dec. 16, 1943	11,759,956	11,759,956
Total deductions	35,754,861	35,754,861
Net direct investment (as defined by Panama Canal Company Act, as amended), as tentatively stated at June 30, 1954 and 1953 (note 6 and table 1)	377,764,946	376,204,276
RETAINED INCOME:		
Balances at July 1, 1953 and 1952, as previously reported	83,554,357	74,373,329
Net income for years ended June 30, 1954 and 1953, as tentatively stated (table 3)	4,160,010	7,200,963
Adjustments to prior years' stated net income:		
Changes in interest payable to U. S. Treasury for prior years arising from revisions to valuation of net direct investment	(2,098,119)	19,469
Additional provision for overhaul of Gatun Locks applicable to prior years	(399,601)	
Capitalization of equipment charged to expense in prior years and other adjustments to fixed assets and related depreciation and obsolescence allowances, net	(285,036)	18,199
Capitalization of channel improvements charged to expense in 1952		1,885,654
Other adjustments, net	101,221	56,743
Balances at June 30, 1954 and 1953, as tentatively stated (table 1)	85,032,832	83,554,357
TOTAL EQUITY, JUNE 30, 1954 AND 1953, AS TENTATIVELY STATED (note 6)	462,797,778	459,758,633

The accompanying "Notes Pertaining to the Financial Statements" are an integral part of this statement.

[fol. 151]

TABLE 3.—INCOME STATEMENT, YEAR ENDED JUNE 30, 1954

	Total	Canal and other marine operations (table 4)	Allied maritime operations (table 5)	Supporting service operations (table 6)
REVENUE:				
Canal tolls	$33,302,149	$33,302,149		
Credit for tolls on U. S. Government vessels	3,888,957	3,888,957		
Sales of commodities	26,136,169			$26,136,169
Sales of services	20,643,557	2,874,650	$6,532,620	11,236,287
Rental of quarters	2,424,345			2,424,345
Total revenue	86,395,177	40,065,756	6,532,620	39,796,801
OPERATING EXPENSES:				
Direct expenses including cost transfers	48,700,739	14,326,406	6,464,846	27,909,487
Cost of commodities sold and transferred	22,002,671			22,002,671
Allowance for depreciation	4,610,744	1,777,491	479,325	2,353,928
Total operating expenses	75,314,154	16,103,897	6,944,171	52,266,086
Less costs transferred to other activities	17,250,035	301,982	1,929,571	15,018,482
Net operating expenses	58,064,119	15,801,915	5,014,600	37,247,604
OPERATING INCOME	28,331,058	24,263,841	1,518,020	2,549,197
GENERAL CORPORATE EXPENSE:				
Net cost of Canal Zone Government (table 3—Canal Zone Government)	10,366,079			
Interest payable to U. S. Treasury (tentative)	8,847,255			
Administrative and other general expenses (table 7)	4,957,714			
Total	24,171,048			
NET INCOME, AS TENTATIVELY STATED (table 2)	4,160,010			

The accompanying "Notes Pertaining to the Financial Statements" are an integral part of this statement.

[fol. 152] Notes Pertaining to Financial Statements for Year Ended June 30, 1954

1. *Valuation of Fixed Assets.*—Fixed assets are stated at cost to the Company or other Government agency originally acquiring them. Valuation allowances provide for accrued depreciation on a straight-line basis and reflect economic value of the assets to the Company where necessary. The basis for net valuation of assets transferred to

the Company from the Panama Canal agency, as prescribed by section 246 of title 2 of the Canal Zone Code, as amended, involves consideration of the cost and probable earning power and other factors affecting the usable value to the Company. The valuation so determined for such assets is subject to the approval of the Director, Bureau of the Budget. Substantial adjustments to the values of the transferred and other fixed assets included in the accompanying balance sheet have been developed and applied in accordance with valuation policies approved by the Bureau of the Budget. The inventory and revaluation work is not complete and the amounts thus far recorded have not been reviewed or approved by the Director of the Bureau of the Budget. The remaining adjustments to fixed assets, however, are not expected to be substantial in relation to the total valuation unless pending proposals for legislative changes are enacted.

The legislation proposed would authorize the accumulation of depreciation on the Canal channel and certain other assets heretofore classified as nondepreciable, the amortization of the costs of certain lands, titles, and treaty rights, and would include the capitalized interest during construction in the interest-bearing investment of the Government. If these changes are made it is estimated that the valuation of properties transferred to the Company and the resulting interest-bearing investment of the Government would be decreased approximately $62 million by the retroactive application of depreciation to the channel and similar costs less the interest during construction that would be added to the investment. Annual interest charges would therefore be reduced by approximately $1.5 million at the 1954 rate, but annual charges for depreciation and amortization would be increased approximately $3.4 million.

2. *Inventories.*—Inventories of materials, supplies, equipment parts and merchandise for resale are valued generally at average cost landed at the isthmus less an allowance of $512,660 representing the cost of certain obsolete materials and supplies acquired by transfer from the Panama Canal agency. Materials and supplies include substantial but undetermined amounts of spare equipment parts and materials in long supply which will not be used within the next several fiscal years at current levels of operation.

3. *Emergency Fund.*—The emergency fund of $10 million was established in the United States Treasury in accordance with the requirements of law by the Company's corporate predecessor and transferor, the Panama Railroad Company (New York). The Company has the right to "borrow" these funds at any time for limited periods without interest, and repayments are available for subsequent "loans."

4. *Defense and Idle Plant.*—Defense facilities and incomplete and excess plant held by the Panama Canal agency were transferred to the Company as of July 1, 1951. The principal items in this classification relate to the partial construction of a third set of locks, which project was abandoned in the early part of World War II, and the special facilities installed in the interests of national defense. Pursuant to the provisions of section 246 of title 2 of the Canal Zone Code, as amended, these properties were transferred to the Company at no net value by establishment of economic valuation allowances equaling 100 percent of cost. The original cost of some of these properties has not yet been determined or set up in the accounts. To the extent that facilities acquired or constructed as part of the third locks and special defense projects are utilized in operations of the Company such properties are carried in plant in service with economic valuation allowances sufficient only to offset any excess costs due to defense features or to recognize marginal utility.

5. *Contingent Liabilities.*—At June 30, 1954, the Company had outstanding a substantial amount of contingent and continuing liabilities, not reflected in the accounts, arising principally from monthly relief benefits payable to retired alien employees, compensation payments due employees and their dependents under the provisions of the Federal Employees' Compensation Act, suits and claims pending against the Company, uncompleted supply, service, rental, and construction contracts, and unfilled purchase orders. In June 1954 monthly relief benefits to retired alien employees were at an annual rate of $1.7 million which, according to a recent actuarial survey, will increase for the next few years owing to the expected excess of accessions to the relief rolls over deaths and other with- [fol. 153] drawals. Outstanding law suits aggregated $3.5

million, but in the opinion of the Company will be settled for a substantially lesser amount. Commitments under uncompleted construction contracts amounted to $4.4 million.

6. *Equity of United States Government.*—The equity of the Government in the Company is stated in accordance with the method prescribed by section 246 of title 2 of the Canal Zone Code, as amended (see table 2). The net direct investment is subject to further revision as a result of pending appraisal adjustments in the valuation of assets and liabilities transferred to the Company and proposed legislative changes as indicated in note 1. In addition the net direct investment was reduced in November 1954 by the further payment of a liquidating dividend to the Treasury in the amount of $10 million.

The rate at which the Company is required to pay interest to the Treasury on the net direct investment is established annually by the Secretary of the Treasury. Since the date when interest has been payable these rates for each fiscal year have been: 1952, 1.95 percent; 1953, 2.05 percent; 1954, 2.342 percent; 1955, 2.43 percent (see table 10 for interest-bearing investment).

[fol. 154]

TABLE 13.—CANAL TRAFFIC,[1] BY NATIONALITY OF VESSELS

Nationality	Number of transits	Measured tonnage: Panama Canal net	Measured tonnage: Registered Gross	Measured tonnage: Registered Net	Tolls	Tons of cargo
Argentine	1	5,016	5,362	3,147	$4,514.40	7,555
Belgian	10	26,207	32,627	21,809	21,468.60	12,733
British	1,265	7,330,847	9,752,498	5,794,072	6,489,389.18	7,726,640
Chilean	78	417,850	599,299	341,352	364,674.94	429,245
Chinese	19	75,191	105,240	63,847	69,384.36	130,112
Colombian	205	484,524	608,757	327,193	435,128.48	240,640
Costa Rican	40	208,011	286,930	189,040	176,013.36	259,137
Danish	275	1,167,889	1,348,004	758,564	1,034,593.74	935,878
Ecuadoran	106	170,825	247,418	136,371	155,136.56	92,932
Finnish	2	13,620	20,764	12,152	11,032.20	14,828
French	136	682,389	884,445	504,728	631,217.84	582,989
German	323	975,176	998,509	567,744	851,910.48	708,338
Greek	146	749,441	1,002,851	614,869	665,990.46	1,246,534
Honduran	347	804,603	1,295,002	757,369	674,091.54	493,260
Irish	3	11,574	12,918	7,140	10,416.60	17,593
Israel	5	23,358	35,886	21,621	22,822.20	43,710
Italian	211	1,029,208	1,389,722	837,617	908,937.72	1,159,700
Japanese	387	2,162,693	2,875,320	1,688,690	1,940,831.82	2,481,494
Korean (South)	8	30,042	42,728	25,538	25,858.44	25,125
Liberian	224	1,040,175	1,415,845	896,773	890,094.78	1,416,303
Mexican	2	1,366	2,136	1,240	1,229.40	2,577
Moroccan	1	7,527	10,627	6,292	6,774.30	14,401
Netherland	130	690,656	930,553	548,127	605,356.96	684,932
Nicaraguan	25	35,968	43,575	19,362	32,371.20	26,469
Norwegian	831	3,980,903	4,652,075	2,742,683	3,431,126.88	3,484,070
Panamanian	611	2,753,650	3,766,357	2,277,329	2,356,325.82	3,666,133
Peruvian	25	62,844	90,906	54,117	57,367.30	54,907
Philippine	27	153,773	179,028	106,940	138,395.70	154,356
Spanish	41	169,749	213,600	135,075	138,849.30	171,304

TABLE 13.—CANAL TRAFFIC,[1] BY NATIONALITY OF VESSELS—Continued

Nationality	Number of transits	Measured tonnage: Panama Canal net	Measured tonnage: Registered Gross	Measured tonnage: Registered Net	Tolls	Tons of cargo
Swedish	230	1,063,160	1,301,359	931,324	933,781.86	818,911
Swiss	11	64,487	61,508	35,928	58,038.30	92,845
United States	2,056	11,613,431	15,574,178	9,138,079	10,087,045.74	11,867,848
Yugoslav	3	19,659	23,859	14,106	17,693.10	31,568
Totals:						
1954	7,784	38,027,812	49,809,886	29,580,238	33,247,863.56	39,095,067
1953	7,410	36,678,636	48,315,051	28,697,741	31,917,515.06	36,095,349

[1] Includes only commercial vessels of 300 net tons and over, Panama Canal measurement, or of 500 displacement tons and over on vessels paying tolls on displacement basis (dredges, warships, etc.).

NOTE.—In canal traffic statistics, foreign naval vessels such as transports, supply ships, tankers, etc., with a measurement of 300 net tons (Panama Canal measurement) and over, and vessels of war, dredges, etc., with a displacement of 500 tons and over, are classified as ocean-going commercial vessels. Statistics on these vessels, except such as pertain to displacement tonnage, have been included in the traffic summaries shown in the preceding table. The following table presents by nationality statistics on the 26 vessels which transited the canal during the fiscal year 1954 and paid tolls on displacement tonnage.

Nationality	Type	Number of transits	Displacement tonnage	Tolls
British	Naval	9	72,094	$36,047.00
Chinese	do	2	5,280	2,640.00
Chilean	do	1	5,000	2,500.00
Colombian	Dredge	1	736	368.00
Ecuadoran	Naval	2	4,015	2,007.50
French	do	8	38,134	19,067.00
Netherland	do	1	1,781	890.50
Peruvian	do	2	3,770	1,885.00
Total		26	130,810	65,405.00

[fol. 155] JUDGE'S NOTE RE MOTION

Jan. 5, 1956

Motion marked "off" pending decision by Judge Walsh on motion in the matter now before him.

Alexander Bicks, U. S. D. J.

[fol. 156] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

MOTION TO DISMISS COMPLAINT—Filed Dec. 16, 1955

SIRS:

Please take notice that upon the annexed affidavit of Leavenworth Colby, sworn to December 15, 1955 and the complaint herein, the undersigned will move this Court at a Stated Term for Motions thereof, to be held at the United States Court House, Room 506, Foley Square, in the Borough of Manhattan, City of New York, on the 22nd day of December, 1955, at 10 o'clock in the forenoon of said day or as soon thereafter as counsel can be heard, for an order, pursuant to Rule 12(b) subdivisions 1 and 7 of the Federal Rules of Civil Procedure, dismissing the complaint on the grounds that

(1) this Court lacks jurisdiction over the subject matter of this action;

(2) the plaintiff has failed to join an indispensable party;

and for such other and further relief as to the Court may seem just in the premises.

Dated: New York, New York, December 16, 1955.

Yours, etc., Warren E. Burger, Assistant Attorney General, Attorney for Defendant, Appearing Specially, Office & P. O. Address 607 U. S. Court House, Foley Square, New York 7, N. Y.

To: Maclay, Morgan, & Williams, Esqs., Attorneys for Plaintiffs, 76 Beaver Street, New York 5, New York.

[fol. 157] DISTRICT OF COLUMBIA,
City of Washington, ss:

AFFIDAVIT OF LEAVENWORTH COLBY IN SUPPORT OF MOTION TO DISMISS

Leavenworth Colby, being duly sworn, deposes and says:

I am Chief of the Admiralty and Shipping Section of the Department of Justice and am familiar with all of the proceedings heretofore had in the above-entitled action.

This is an action on behalf of the class of shipowners using the Panama Canal to recover $27,836,504 for allegedly excessive and illegal toll charges collected by the defendant for the use of the Canal for the period July 1, 1951 to June 30, 1954. The complaint further demands mandatory and prohibitory injunctions requiring the defendant to take steps to reduce the present toll rates. The complaint was filed on September 13, 1955.

[fol. 158] According to the third paragraph of the complaint, jurisdiction in this action is founded upon the Act of June 29, 1948, 62 Stat. 1076 (Public Law 808, 80th Congress, Second Session) and the Act of September 26, 1950, 64 Stat. 1041 (Public Law 841, 81st Congress, Second Session). These laws appear in the Canal Zone Code but not in the United States Code.

I submit this affidavit in support of the defendant's motion to dismiss the complaint.

As appears from sec. 2 of Public Law 808 (62 Stat. 1076), and sec. 2 of Public Law 841 (64 Stat. 1041), the defendant corporation is wholly owned by the United States. The Company's third Annual Report for 1954 states (pp. 1-2):

> "The Panama Canal Company is a corporate agency and instrumentality of the Government of the United States of America, which operates under the management of a Board of Directors appointed by the Secretary of the Army in his capacity as stockholder of the Company. The Company is charged with the maintenance and operation of the Panama Canal; the conduct of the business-type operations incident to the canal operation; and the provision of supply, maintenance, administrative, and other support to the civil government of the Canal Zone.
>
> . . . . . .

"The Panama Canal Company is expected (a) to recover all costs of operation and maintenance of its facilities, including depreciation, (b) to pay interest to the Treasury on the net direct investment of the Government in the Company, and (c) to reimburse the Treasury for (1) the annuity payments to the Republic of Panama under the Covention of 1903 as modified by the Treaty of 1936 between the two Governments, and (2) the net costs of operation of the Canal Zone Government including depreciation on fixed assets. The interest rate for the fiscal year 1954, as set by the Secretary of the Treasury, was 2.342 percent. The Board of Directors is required to appraise, at least annually, the Company's working capital requirements, together with reasonable foreseeable requirements for authorized plant replacement and expansion, and to pay into the Treasury as a repayment of capital the [fol. 159] amount of any funds in excess of such requirements. All funds other than working balances are carried with the United States Treasury."

The Government Corporation Control Act (31 U.S.C. sec. 847) requires the Company to submit its annual budget program to the President through the Bureau of the Budget.

From the statement by General Seybold, President of the Panama Canal Company, at Hearings before the Committee on Merchant Marine and Fisheries of the House of Representatives, March 29, 30, and 31, 1955 (pp. 78-79), it appears that the Company carries in commercial banks only about $5 million, "the minimum needed for our day-to-day requirements. The rest is carried with the United States Treasury." If the plaintiffs succeeded in obtaining their money judgment, it would clearly affect the Treasury of the United States.

It is the defendant's contention that the Court lacks jurisdiction because the United States, an indispensable party, has not been joined, and as the suit in effect is against the United States, which has not consented to be sued, the complaint should be dismissed.

The present toll rate for vessels transiting the Panama Canal was fixed by the President of the United States

(Proclamation No. 2247 of August 25, 1937, as amended by Proclamation No. 2249 of August 31, 1937. See 13 F.R. 1623) in 1937, pursuant to specific authorization (37 Stat. 560, c. 390, sec. 5) and the rate so fixed "shall continue in effect until changed" (64 Stat. 1038, sec. 11).

It is the defendant's contention that since the complaint fails to raise any question as to the constitutionality or legality of these laws or orders issued by the President of the United States, the present rates are legal and the Court lacks jurisdiction to enter any judgment for recovery of tolls alleged to be illegal.

[fol. 160] Under sec. 11 of Public Law 841 (64 Stat. 1038), the defendant is authorized to change the tolls, but such proposed changes "shall be subject to, and shall take effect upon, the approval of the President of the United States, whose action in such matter shall be final and conclusive." For reasons indicated below, the defendant has not yet submitted any proposed changes to the President of the United States.

According to testimony given at a hearing, December 5, 6 and 7, 1955, before the Panama Canal Sub-Committee of the House of Representatives, Mr. Robert E. Mayer, President of the Pacific American Steamship Association, stated (p. 9 of mimeographed transcript):

> "Our counsel, has advised us 'that if there were a [toll rate] hearing under the present law, the users of the Canal would have no right of appeal from the decision of the Board [of Directors of the Panama Canal Company].

It is the defendant's contention that the Court lacks jurisdiction to issue injunctions designed to control the exercise of discretion by the President of the United States and by the Company.

The annual and other reports issued by the Company, copies of which will be furnished to the Court at the hearing of this motion, show that the Company's principal source of revenue is tolls collected from vessels which transit the Canal, and that since 1937, the rate of tolls fixed by the President of the United States pursuant to authorization from Congress has been 90 cents per laden

vessel ton. General Seybold, President of the Panama Canal Company, at hearings before the Committee on Merchant Marine and Fisheries, House of Representatives, March 29, 30 and 31, 1955, stated (p. 13) that the toll rate has remained constant since 1937 even though freight rates on all routes have increased significantly since then.

[fol. 161] Since 1951, this rate has been continued in effect by Public Law 841 until the Company exercises authority to call a hearing and change the rates, subject to final review and approval by the President.

The reports submitted to the Congress by the Company disclose that the Company has been engaged in a continuing study of the rates of tolls for use of the Panama Canal. In his statement before the Panama Canal Sub-Committee, Committee on Merchant Marine and Fisheries, House of Representatives, June 9, 1954, General John S. Seybold, President of the Panama Canal Company, and Governor of the Canal Zone, said (pp. 19-20):

> "Under date of March 9, 1954, I submitted to the Congress a report of the Company's continuing study of the rates of tolls for use of the Canal. This report stated that as of that date the existing rates were sufficient to cover all operating costs, including interest and depreciation, as required by the tolls statutes. Although since the date of that report, traffic through the Canal has continued to decrease slightly, the decline has not proceeded at as high a rate as had been forecast approximately six months ago. The Company is maintaining current projections of traffic through the Canal and will, of course, take the steps necessary to increase the rate of tolls when if required by the provisions of the statute.

Public Law 841 requires that the Company revalue its assets to ascertain the investment of the United States after analysis of cost, probable earning power, depreciation, obsolescence and shrinkages in value and "insofar as practicable, there shall be excluded from such amount any portion of the value of the transferred property which is properly allocable to national defense." Until this revaluation has been completed no new toll rate can be considered.

[fol. 162] As further appears from the above statement by General Seybold (p. 15):

> "Since the date the reorganization became effective, first priority has been given to a study of the value of properties transferred to the Company as required by the law. A preliminary appraisal and inventory of the properties so transferred has been completed and the firm policies governing the valuation of the properties as well as the rates of depreciation and obsolescence have been developed."

Under Public Law 841, when this revaluation has been completed by the Company, it must be approved by the Bureau of the Budget before new toll rates can be submitted to the President of the United States.

General Seybold in his statement before the Commerce and Related Agencies Sub-Committee of the Committee on Appropriations of the United States Senate in submitting the Company's budget program for fiscal year 1956 said (pp. 9-10):

> "On January 25, 1955, the United States and Republic of Panama signed a new treaty and related memorandum which may have far-reaching effects upon the fiscal operations of the Panama Canal Company. It is too early to determine these effects since the treaty has not yet been ratified by the Senate, and some of the proposals of greatest fiscal consequence will require Congressional action. The new treaty would increase the annuity payable to Panama by $1.5 million, from the present $430,000 to $1,930,000. Subject to legislative directive, extensive real estate holdings in the Republic of Panama would be transferred to Panama without charge. Under the new argeement, when ratified, the Company will discontinue the sale of goods and services to non-citizen employees who do not live in the Canal Zone and will discontinue sales of certain supplies to ships. The new agreements also contemplate the extension of the Civil Service Retirement Act to our non-citizen employees."

[fol. 163] This treaty was ratified by the United States Senate in July 1955, shortly before the adjournment of

the last session of Congress (69 Stat.). The will of Congress remains uncertain as to the extent to which the increased annuity and the increased expenses resulting from the extension of civil service benefits should be borne by the Company. The will of Congress must first be ascertained before any change in toll rates can be considered.

There is the statement by General Seybold before the Committee on Merchant Marine and Fisheries of the House of Representatives on March 29, 30, and 31, 1955 (p. 76) that the Company expects a loss for 1956. He also states (p. 82):

> "* * * We cannot state today the effect of the new treaty upon the Company and its fiscal status. There will be large annual loss to the Company if these charges are placed against the Company, such as the increased annuity, but that is a matter which will have to receive the attention of Congress before it is done. We also will be charged, I am sure, with the extension of civil-service benefits to the noncitizen group. There will be a loss in our income due to sales of ships. And there will necessarily be a fairly large replacement program for employees' quarters, schools, and the like, for the facilities which are now presently in that area in Colon, which will be transferred to the Republic of Panama.
>
> "All of these items will be, of course, determined by the Congress to see what its burden shall be on the Company. It would be very difficult to anticipate just what the final answer will be in that matter. The treaty has been signed but has not been ratified by the Senate as yet. I think the outcome of that and the matter of the legislation that has been discussed here will have an effect on the fiscal status. The amount will be determined when the terms are set and the will of Congress is shown."

[fol. 164] On or about May 16, 1955, the General Accounting Office submitted to the Congress an advisory report (Report on Audit of Panama Canal Company and the Canal Zone Government for the Fiscal Year ended June 30, 1954. House Document No. 160, 84th Congress, 1st Session). A copy of this report will be furnished the

Court at the argument of this motion. Under the Government Corporation Control Act (31 U.S.C. 846) the Company is specifically included as a "wholly owned Government corporation." Under sec. 851 the General Accounting Office is empowered to make such recommendations in connection with its audit report, as it may deem advisable. Under the Accounting and Auditing Act of 1950 (31 U.S.C. 65a) the Company, a Government corporation under the Government Corporation Control Act is not an "executive agency" and is not subject to accounting or other control by the General Accounting Office.

The following statement is contained in said report (pp. 2 and 3):

> "Based on the financial results of the canal activity for the past three years, toll rates would have to be reduced substantially *if* hearings were held at this time." [Emphasis supplied]

In this report the General Accounting Office did not recommend, nor did it have the power to require, that hearings *should* be held at this time. In this report the General Accounting Office did not state, nor did it have authority to state, that shipping companies using the Canal were entitled to recover any monies in connection with tolls which they had previously paid, or that the present tolls are illegal.

[fol. 165] The above audit report states (p. 1):

> "We are unable to state that the accompanying financial statements (exhibits 1-7) present fairly the financial position of the Canal organization at June 30, 1954, or the results of operations for fiscal year 1954," [for various reasons including the fact (page 2)] that the "inventory and appraisal of properties is still incomplete . . . the management expects to complete the inventory and appraisal in 1956. Any adjustments to property or inventory accounts will affect the net investment of the Government, annual interest charges, and the amount of indebetedness to the Treasury at June 30, 1954. Property adjustments will also involve changes of annual depreciation charges."

With reference to the above statements, the report further states (p. 27):

> "The revaluation of assets transferred from the Panama Canal agency on July 1, 1951, was begun in November 1952. The management expects the revaluation to be completed in fiscal year 1956. Therefore, fixed assets, accumulated depreciation and obsolescense, and depreciation for the current year are tentatively stated in the financial statements. Defense facilities and idle plants are fully offset by a valuation allowance."

The report states (p. 28):

> "The amounts of the United States Government's net direct investment in the Company and in the Canal Zone Government are subject to adjustment upon completion of the inventory and appraisal of assets. Appraisal of the assets transferred to the Company from the Panama Canal agency on July 1, 1951, is required by law. The Canal organization is also appraising all other properties so that all property valuations will be stated on a consistent basis."

Exhibit 1 (p. 33) of the report *tentatively* states the investment of the United States in the Panama Canal Company and Canal Zone Government. Exhibit 3 (p. 35) *tentatively* indicates revaluation adjustments to assets transferred from the Panama Canal agency to the Company. Exhibit 4 (p. 37) *tentatively* states the income of the Company.

[fol. 166] Until the value of the assets transferred from the Panama Canal agency to the Company is determined by the Board of Directors and approved by the Director, Bureau of the Budget, no final action can be taken on a new toll rate.

The report (p. 21) refers to a number of particular factors which may materially affect future operating results of the Canal organization. Such effects of future operations may well affect future toll rates, but at the present time the "financial effects of all these changes are unknown, because the management has not had sufficient time to make a complete forecast." (p. 21)

Certain of these factors seem noteworthy in view of their possible effect upon future toll rates.

The treaty with the Republic of Panama, which was ratified by the United States Senate in July 1955, will increase the annuity paid to Panama from $430,000 to $1,930,000, thus increasing the annual cost of operations by $1,500,000. (p. 21)

In consequence of this treaty, the Congress will be requested to enact legislation authorizing the establishment of a single basic wage scale and providing for uniform application of the Civil Service Retirement Act for all American and Panamanian employees of the United States in the Canal Zone. (p. 21) As stated in the report (p. 21) "the extent to which these benefits will affect annual payroll costs cannot be determined until all positions in the Canal organization have been classified." This involves nearly 11,000 non-American employees. "(p. 22)

Proposed salary increases for Federal employees, which have been under consideration of the Congress, would increase the operating costs of all Canal organization activities. (p. 23)

[fol. 167] The complaint herein was filed shortly after the issuance of the above advisory audit report to the Congress by the General Accounting Office. The General Accounting Office did not recommend that a hearing should be held at this time. In the event that a hearing were held by the Company, it still remains uncertain whether a proposed change in toll rates would be approved by the President, whose judgment is final and conclusive in this matter. As appears from the statement by Mr. Robert E. Mayer, quoted on p. 4 of this affidavit, their counsel advised that if there were a hearing under the present law, the users of the Canal would have no right to appeal from the Company's decision.

It affirmatively appears, therefore, that the Company and the General Accounting Office are in agreement that new toll rates cannot be fixed at this time because the process of revaluation of the Company assets has not yet been completed. The Company and the General Accounting Office are likewise in agreement that implementation of the recently ratified treaty with the Republic of Panama might result in an increase in toll rates if, as is likely, the

Company bears the extra costs contemplated by that treaty. As the present toll rates were fixed by the President in accordance with law, the complaint should be dismissed. Until the President approves new rates, nothing can be done, and the action to change the rates is prematurely brought. Since the plaintiffs' claims are actually against the United States, and since the United States has not been made a party, the complaint should be dismissed. [fol. 168] I, therefore, respectfully ask that this motion to dismiss the complaint be granted.

Leavenworth Colby

Sworn to before me this 15th day of December 1955.

Gladys E. McGaffey, Notary Public

[fol. 169] In United States District Court, Southern District of New York

[Title omitted]

Excerpts from Transcript of Hearing Before Judge Walsh— December 20, 1955

Before Hon. Lawrence E. Walsh, District Judge

New York, December 20, 1955
2:15 o'clock p.m.

Appearances:

Maclay, Morgan & Williams, Esqs., Attorneys for Plaintiffs; C. Dickerman Williams, Esq., of Counsel.

Paul W. Williams, Esq., United States Attorney, for the Defendant; Robert Seaver, Esq., Attorney, Department of Justice.

[fol. 170] (Case called.)

Mr. Seaver: Ready for the motion.

The Court: All right.

Mr. Seaver: As your Honor heard this morning, this is an application for the extension of defendant's time to perform certain acts which I will describe a little later.

I notice the plaintiff has seen to it that we are on the record here today.

This is a class action brought by all of the shipping companies, both American and foreign, whose vessels have occasion to transit the Panama Canal, brought against the Panama Canal Company, a government corporation, to recover the sum of approximately $38,000,000, representing allegedly excessive tolls charges for transiting the Canal.

The tolls are alleged to be excessive because the defendant has failed to establish the toll rates in accordance with the criteria established by Congress and the statutes.

The plaintiffs also seek equitable relief in the form of injunctions and mandamus to compel the establishment of these tolls in accordance with their view of the statutes. [fol. 171] They also ask an accounting and declaratory relief.

Essentially, I think it can be said that the plaintiffs ask this Court to establish the rate for the tolls for going through the Panama Canal retroactively to July 1, 1951.

Now the defendant has filed a motion to dismiss the complaint based solely on the lack of jurisdiction of this Court over the subject matter of this action, and the failure of the plaintiffs to join an indispensable party, the United States. This motion will be heard before your Honor the day after tomorrow, on the 22nd.

The present applications which I am arguing now are two: The first of these two is an application for the extension of the time for the defendant to respond to various discovery practices initiated by the plaintiffs, or to move with respect to the discovery matters, which consist of interrogatories, a request for admissions, two depositions to be taken in Washington, that of the Comptroller General of the United States and one of his principal officials in the General Accounting Office; and, incidentally, if our motion is granted here on the basis that we are asking, [fol. 172] it will also alleviate the need of the Government to move to quash subpoenas duces tecum served on the Comptroller General, which motions will be made in the district court by the Government this week unless this extension is granted.

The second application seeks an extension of the time for the defendant to file these affidavits in response to what is in effect a motion for summary judgment filed by the

plaintiffs, and an extension of the hearing of that motion.

We are presently faced with a deadline for filing our responses to these various things, the 22nd, the day after tomorrrow. The hearing of the motion for summary judgment is now set for the 5th of January. We are asking that all of these deadlines be extended up to thirty days after the defendant's motion to dismiss, raising the question of this Court's jurisdiction, is decided.

Now we have made these motions, divided them into two, because it occurred to us that your Honor may possibly prefer that that motion addressed to the motion for summary judgment filed by the plaintiffs, go to Judge Edelstein, who signed the show cause order, which was the means plaintiffs employed to bring up the motion [fol. 173] for summary judgment.

Now, since that was signed, since that time, the parties have agreed upon an extension of the time for doing the things outlined in the show cause order. I personally do not request particularly that it go to Judge Edelstein, and I do not personally feel that it should necessarily go, but I mention that just in case your Honor should prefer that it go there.

Actually, the grounds for both motions are the same, and it is the same case, and I think expediency would dictate that your Honor hear both of them.

Now, our request for extension of time is based on two grounds; first, we simply require more time to assemble and correlate the vast amount of documentary evidence that is called for in these various moves of the plaintiffs, but, more important, I think much more important, is the rule frequently announced by the Supreme Court and other courts, that an issue of jurisdiction should be decided before any other action is taken in a case.

Now we feel very sincerely that there is a grave doubt as to the Court's jurisdiction in this case.

[fol. 174] The Court: What is the lack of jurisdiction based on?

[fol. 175] The Court: Let us see what your opponent has to say. I think I have got your point.

Mr. Williams: Your Honor, my objection to Mr. Seaver's motion is basically this, that what he is making here is not really a motion to dismiss for want of jurisdiction, but,

really, a motion for summary judgment dismissing the complaint.

I say that because the motion is supported by an affidavit of Mr. Colby, which goes way beyond any possible jurisdictional question, and goes directly to the merits of the case, and makes it very clear that what he is making here is a cross-motion to our motion—his cross-motion having been made on December 16th, whereas our motion for summary judgment was made on October 28th.

Now, as Mr. Seaver has described the nature of the suit, and as it is my object to sell the substantial identity of these two motions—that is to say the Government's motion or, rather, Mr. Seaver's motion is basically one [fol. 176] for summary judgment in his favor, whereas our motion is basically one for summary judgment in our favor, I would like to compare the motion papers.

But first let me describe the nature of the case in general. [fol. 177] Now I want to show the substantial identity as to subject matter, at any rate, of our motion and the defendant's motion here.

If your Honor will turn to Mr. Colby's affidavit supporting Mr. Seaver's motion, your Honor will find on page 8, it begins "On or about May 16, 1955"——

The Court: Yes.

Mr. Williams: —"On or about May 16, 1955 the General Accounting Office submitted to Congress a final report," and so forth.

The second sentence is:

> "A copy of this report will be furnished the Court at the argument of this motion."

In other words, the defendant states that for the determi- [fol. 178] nation of its motion it is necessary that the Court have that report before it.

Now if your Honor will turn to our own motion, to Exhibit A—and there are little letters there stating where the various exhibits begin—your Honor will find that Exhibit A is that very report that Mr. Colby refers to as one of the bases for his motion. In other words, his motion is based on the GAO audit report for 1954. Our motion is based on the GAO audit report for 1954.

Now if your Honor will turn to page 4 of Mr. Colby's affidavit supporting the motion to dismiss, your Honor will find in the paragraph, first sentence of the paragraph at the bottom of the page, a sentence beginning:

> "The annual and other repor issued by the company, copies of which will be furnished to the Court at the hearing of this motion, show that the company's principal source of revenues," and so forth.

Now he is there talking about the annual reports issued; I don't know what other reports he means, but I do know what he means by the annual reports, and just as they are the foundation of his motion, they are also the founda- [fol. 179] tion of my motion.

Now if your Honor will turn to Exhibit E, in that set of exhibits attached to my motion your Honor will observe that Exhibit E is the first annual report of the Panama Canal Company.

In other words, that is one of the annual reports on which he is going to rely.

Now if your Honor will turn to Exhibit F, your Honor will observe that that is the second annual report of the Panama Canal Company, another exhibit upon which the defendant relies in support of its motion.

The Court: I do not suppose it is so much a question of he relies on the same documents as it is of what the issue is, that he refers to them for.

Is there anything controversial in this affidavit he submits in support of his motion that the Court lacks jurisdiction?

Mr. Williams: Your Honor, if it were simply based on provisions of law, I would not be making the point I am making now. My point is that we both rely upon the same documents. I say those documents entitle me to relief; Mr. Seaver says those documents entitle him to relief.

[fol. 180] Now may I also say this: These motions to dismiss, which are supported by affidavits, have frequently come before this Court, and both the Court of Appeals and this Court have continually and consistently ruled that when a motion to dismiss is supported by an affidavit, it is the equivalent of a motion for summary judgment in favor of the defendant; and what we basically have

here are two cross-motions for summary judgment, and all I am saying is that they should be heard at the same time.

Now, if at the conclusion of the argument the Court thinks that there is sufficient force in any jurisdictional contention that is made by Mr. Seaver, he did not go into the other arguments; but we began this suit in September. Our motion was made in October. In early November the defendant asked for an extension of time and asked for January 5th for the return date of our motion for summary judgment.

Now, basically, what he is trying to do here is to get his motion for summary judgment——

The Court: We have been all over that, Mr. Williams. What I don't understand is this: Why do we need to make him go ahead and prepare a long set of papers on the merits when I can decide that without any controversy as [fol. 181] to the facts? Is there any controversy between you as to the facts on the jurisdictional point, or is it just a question of law? Or is this just background too——

Mr. Williams: It is more than that.

The Court: That is what I would like to hear about.

Mr. Williams: Would your Honor direct your attention to page 7 of the supporting affidavit on the defendant's motion here?

The Court: Yes.

Mr. Williams: On page 7 he refers to a treaty, which was a treaty with the Republic of Panama.

Now the second sentence on page 7 is:

> "The will of Congress remains uncertain as to the extent to which the increased annuity and increased expenses resulting from the extension of Civil Service benefits should be borne by the company. The will of Congress must first be ascertained before any change in toll rates can be considered."

In other words, he is saying that the prospect of a new law dissolves or constitutes a defense to our contention of action unlawfully withheld and unreasonably delayed. [fol. 182] This talk of the treaty here can only be responsive to our point that action here has been unreasonably delayed and unlawfully withheld.

The Court: How does that bear on the lack of jurisdiction and the other point, which are the only two points he is asking me to pass on?

What you are saying is that he has a lot of prejudicial statements which might prejudice me if I were to come to the summary judgment motion, but if it is all surplusage, what difference does it make?

He raises two points, one, that only the President can review these rates, and, two, that inasmuch as they must ultimately be paid by the United States Treasury, the United States is a necessary party.

Now, are those facts in controversy?

Mr. Williams: Well, there is not any doubt that the law provides that although the defendant here shall prescribe rates in accordance with the formula which I read to your Honor, before the rates actually take effect, the approval of the President must be obtained. In other words, the President has a Veto over these rates.

[fol. 183] But the fact that the President may upset the rates or reverse the rates is not a reason why these people —why the defendant should not go ahead and prescribe the rates. The duty was laid on the defendant five years ago, and the President can't act until something is served up on him.

The Court: He is not suggesting that as a defense on the merits. He is saying that is why I can't even hear the case; that the President is the exclusive person who can review that.

Now whether he is right or wrong on that is another question. Whether the mere fact that the President has to approve what this corporation does means that I do not have an opportunity to review what it does as against the statute, which is quite a different question—but all he says is why go ahead and do all this work on the merits when on that question of law you may not have any right to hear it?

Mr. Williams: Well, will your Honor strike Mr. Colby's affidavit from the record?

The Court: If there is nothing in there on the question of jurisdiction it is harmless; why do we have to go ahead now? Why do I have to pass on that at this moment? [fol. 184] What does that have to do with whether we hear this first or whether we do not, inasmuch as I am very un-

likely to hear this thing on the merits? If I should happen to read Mr. Colby's affidavit, I can strike it if I conclude it is worthless.

Mr. Williams: The point is that in putting in a supporting affidavit based on the same documents on which our motion is based, he is making it possible for your Honor to deny our motion on the ground that the delay, we will say, has been reasonable. In other words, the affidavit is loaded with facts which can only be relevant as to the reasonableness or lack of reasonableness on the delay.

The Court: If you want assurance that I am not going to pass on the merits or the reasonableness of the delay, but only this Court's power to hear the whole question, why, I will give that to you right now. In other words, the only question that is going to be raised on December 22nd is whether this Court can hear the case, to begin with; and the only answer that you can get is either (1) we can't even hear it, or (2) we can hear it; and if we conclude we can hear it, there will be a fresh slate and a fresh start on who is right and who is wrong.

[fol. 185] Mr. Wililams: Well, when you narrow it down that way, your Honor, it is very difficult—frankly, I think the motion, even the jurisdictional point, can best be heard in the light of the background, and if your Honor is going to hear the background, your Honor might as well grant——

The Court: I will tell you, I am honestly not interested in the background except that it is nice to know in a vague sort of way what the lawsuit is about, just so you understand various positions and can get some sense out of them in reality rather than as an abstraction.

I would agree with you as a general proposition that if you could bring all of these proceedings on at once I think there would be some advantage to the Court; but to ask the Government to go ahead and start moving to quash subpoenas, fighting over what facts should be produced and what should not, and they get up sets of papers like these, I do not see much gain.

Mr. Williams: Your Honor, this talk about all these discovery proceedings is just an attempt to obscure the issue. The discovery proceedings came down primarily to this: The general counsel for the defendant company delivered

[fol. 186] an opinion to the company saying in substance that they had to reduce Canal tolls. At least that is the intimation.

This opinion is described in part in that GAO audit report.

Now, the GAO audit report simply tantalizes us. It talks about this opinion, and the only thing we can conclude about what the GAO says about it is that it is an opinion of what the General Counsel of the defendant himself rendered, in our favor, and we thought we would be helpful, and it would be helpful to the Court in hearing the argument of this case, to know what the defendant's own general counsel thought about the case, and, if we can, establish that the defendant has been disregarding the opinion of its own general counsel.

Most of the so-called discovery proceedings represented —they are desperately avoiding any attempt on our part, our effort to get hold of this opinion. Apparently the opinion does say what we think it says, otherwise I can't imagine why it would not be produced.

The Court: Mr. Williams, how are you going to be prejudiced if I hear the other case first?

Mr. Williams: In this way, your Honor. As Mr. Colby or Mr. Seaver have recognized, even the motion to dismiss [fol. 187] for want of jurisdiction can best be heard in the light of the background. The background is the same with his motion or with my motion. If your Honor hears the background, your Honor can just as well grant a decision in our favor as a decision in the Government's favor. The arguments are going to be exactly the same. When I argue against——

The Court: I don't think so. If I started hearing your motion, then I have got to go into the reasonableness of these rates; but if I hear his motion, I don't care about reasonableness. I am going to decide if we are even going to go into the reasonableness.

Mr. Williams: Your Honor, here a duty was laid on the defendant five years ago. They issued obscure financial statements. Finally, the General Accounting Office came out and showed what they had failed to do, that they disregarded their duty.

All the documents on this from their point of view or our point of view are the same. They are official publications of the United States Government. They are not anything we say. We are taking their story, and that was given, your Honor——

The Court: Whether their statements are obscure—how [fol. 188] does that give me jurisdiction one way or the other?

Mr. Williams: Well, in deciding the question of jurisdiction—in others words, the two motions are cross-motions and should be heard together. To hear their motion you have to hear the same facts.

I will make the same argument in answer to Mr. Seaver's motion that I make in support of my own motion. The arguments are exactly the same, and they should be combined, or, at least, they should be heard together; and simply a piecemeal determination of the case is simply going to take a lot more time, and five years have elapsed already. We are charging them with unlawfully withholding action and unreasonable delaying action. This is simply an effort to continue that unlawfully withholding and unreasonable delay.

What I object to is a delay in this case on top of a further five-year delay.

We started the case in September. We served our papers in October. In early November they asked for an adjournment and we gave them the adjournment. Now, at the very last minute, in an effort to get across a further stall, they come in with this maneuver by which they think [fol. 189] they can put up an argument, a legal point that will stall the whole thing alone for a little more. Congress supposedly gave us rights, and the legislative history on that is abundantly clear. They gave us those rights in 1950, and here we are in 1955 not getting them today.

What I would like is to have your Honor or whoever is going to hear the motion, have all the facts before them, and the necessity to have all the facts before it to decide the Government's own motion is established by the fact that the Government's own motion is supported by an affidavit which recites the same facts as we recite.

Now we are coming into a court of equity. The Administrative Procedure Act says a citizen can get action against

a government agency for unlawfully withholding and unreasonably delaying.

Here we have been holding off for five years.

The Court: I have got that picture, Mr. Williams.

Mr. Williams: I submit we are in a court of equity——

The Court: I get your point.

Let me hear Mr. Seaver for a second.

Mr. Seaver, what is the point in the two arguments? Is [fol. 190] there a great deal of work you would have to do now to prepare papers——

Mr. Seaver: There is a monumental job ahead of us as lawyers for the defendant here to assemble this vast amount of material that comes from the Canal Zone, the General Accounting Office, and the Bureau of the Budget, and other agencies.

The Court: Now I am going to grant your motion to defer hearing on the merits until we pass on this jurisdictional point.

Now we will come to the question of whether the 22nd is convenient or whether it is not.

Mr. Seaver: I might say this, your Honor: Yesterday or the day before, when I talked to Mr. Williams about the time, he asked that the hearing on the motion to be dismissed be adjourned for two weeks. Now I would not have any objection in the light of your Honor's——

The Court: Well, I assume that you are ready, and, Mr. Williams, you are the one who is complaining about the delay, so when do you want to go into this jurisdictional point?

Mr. Williams: Of course this motion to dismiss was served on me at 4:59 p.m. Friday——

The Court: Well, you got a good long start on this [fol. 191] thing.

Mr. Williams: When they asked for an adjournment of our motion for summary judgment which had been set for December 6th, they asked for an adjournment until January 5th, and I assumed that the whole case would be heard on January 5th.

And, your Honor, I feel, suppose in hearing the argument on January 5th on their motion the judge has heard everything and is prepared to grant us relief, it seems to me that what your Honor is doing here——

The Court: I do not see how he can be prepared to grant you relief unfil he knows they have exhausted their proof. Now, I do not want to get back into that question.

Tell me, just when do you want to have this motion? You can have your choice of any day, any motion day, including today.

Mr. Williams: Of course we are getting into the Christmas season, and I could not be ready by December 22nd, which is the day after tomorrow. I will try to be ready by December 28th.

The Court: It would be the 29th or the 27th of December.

[fol. 192] Mr. Williams: The 29th, then.

The Court: It would help me a great deal, and I do not want to add to your burdens, but if you can exchange your briefs and give them to me ahead of time I will appreciate it.

I think this is not going to be too easy a question of law.

Mr. Williams: Your Honor, to talk about the fact that you can't sue because the Government is involved, Congress has expressly said the defendant can be sued.

The Court: The only thing I have in mind now is whether you can give me your brief by Tuesday.

Mr. Seaver: Your Honor, the defendant will have its brief to you at that time.

Mr. Williams: To tell you the truth, I have been working on a brief; I will try to get it to your Honor by Tuesday.

Does your Honor always want briefs a couple of days in advance?

The Court: It helps me because it gives me a chance to read them before. If you can't make it, it is all right with me.

Mr. Williams: Well, your Honor has gotten into the [fol. 193] case, and your Honor has gotten some familiarity with it, and we might as well.

However, I might say that my answering affidavit to Mr. Colby's affidavit will be the same things that are there.

The Court: All right. I have got the affidavits to work with already. Then, if you get the brief in by Tuesday or, at the latest, Wednesday — I would like to have it Tuesday, but if you can make it by Wednesday, that is better than none at all.

Now we will go ahead and I will hear what some of these others have to say.

Mr. Williams: Now, your Honor, I understand you are simply going to hold these discovery proceedings in suspense until the argument on the 29th, is that right?

The Court: What period of time is reasonable after my determination?

Mr. Seaver: Our motions ask that all of these deadlines be adjourned for a period of thirty days after the decision on the question of jurisdiction.

Mr. Williams: I think your Honor is going to find that that is an unnecessary motion, and I would suggest that your Honor just stay things until the 29th, and then reserve [fol. 194] decision. At that time the argument will familiarize your Honor with the case somewhat more.

The Court: I will stay things to the 29th, and I won't leave either of you in a hole at that time.

Motion granted as indicated on the argument, and the parties can serve orders, settling orders on notice.

Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 195] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER EXTENDING TIME TO FILE AFFIDAVITS IN ANSWER TO MOTION FOR SUMMARY JUDGMENT TO DECEMBER 23, 1955

The defendant having moved this Court for an order modifying the order dated October 28, 1955 signed by Honorable David N. Edelstein, by directing that (1) in the event of the denial of the defendant's pending motion to dismiss the complaint herein, defendant shall serve its answering affidavits herein on plaintiffs' attorneys within thirty days after the denial of said motion to dismiss the

complaint, and (2) fixing the return date of the hearing under the said order to show cause dated October 28, 1955 for ten days after the service of such answering affidavits, and said motion having duly come on to be heard before this Court on the 20th day of December 1955,

Now on reading defendant's order to show cause dated December 19, 1955 with due proof of service thereof on the attorneys for the plaintiffs, the affidavits of E. Robert Seaver sworn to December 19, 1955, the complaint herein and the order to show cause dated October 28, 1955 signed by Honorable David N. Edelstein, and after hearing Warren E. Burger, Assistant Attorney General of the United States, and E. Robert Seaver, Attorney, Department of Justice, attorneys for the defendant, in support of said motion, and Maclay, Morgan & Williams, Esqs., attorneys for the plaintiffs (C. Dickerman Williams, Esq., of counsel), in opposition thereto, and due deliberation having [fol. 196] been had by the Court, it is

On motion of Warren E. Burger, Assistant Attorney General of the United States, attorney for the defendant herein,

Ordered that the time within which the defendant may serve and file affidavits in answer to plaintiffs' pending motion for summary judgment returnable on January 5, 1956, be and the same hereby is extended to and including December 29, 1955, until after the argument before this Court of defendant's pending motion to dismiss the complaint herein, and it is

Further Ordered that such disposition as the Court may deem appropriate with respect to any further extension of the defendant's time to serve such answering affidavits and adjourning the date for the hearing of plaintiffs' pending motion for summary judgment, shall be made on December 29, 1955, after the conclusion of argument before this Court of defendant's pending motion to dismiss the complaint herein.

Dated: New York, N.Y., December 23rd, 1955

Lawrence E. Walsh, United States District Judge

[fol. 197] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER RE: TAKING OF FURTHER DEPOSITIONS, ETC.—December 23, 1955

The defendant having moved this Court for an order (1) adjourning the date set for the taking of the deposition of Comptroller General Joseph Campbell of the United States until thirty days after the decision of this Court on defendant's pending motion to dismiss the complaint with the reservation to the defendant of the right to make any motion with respect to said notice and the subpoena issued in connection therewith, (2) adjourning the date set for the taking of the deposition of William Newman until thirty days after the decision of this Court on defendant's pending motion to dismiss the complaint with the reservation to the defendant of the right to make any motion with respect to said notice and the subpoena issued in connection therewith, (3) extending the time of the defendant to answer, except or make any motion with respect to the interrogatories propounded by the plaintiffs to the defendant for the same period, and (4) extending the time for the defendant to answer plaintiff's request for admissions or make any motion with respect to said request for the same period, and said motion having duly come on to be heard before this Court on the 20th day of December 1955,

Now on reading defendant's order to show cause dated December 19, 1955 with due proof of service thereof on [fol. 198] the attorneys for the plaintiffs, the affidavits of E. Robert Seaver sworn to December 19, 1955, the complaint herein, the order to show cause dated October 28, 1955 signed by Honorable David N. Edelstein, plaintiffs' interrogatories addressed to the defendant, pliantiffs' request for admissions addressed to the defendant, the notice to take the deposition of Comptroller General Joseph Campbell and the subpoena issued in connection therewith, and the notice to take the deposition of William Newman together with subpoena issued in connection therewith, and after hearing Warren E. Burger, Assistant Attorney Gen-

eral of the United States, and E. Robert Seaver, Attorney, Department of Justice, attorneys for the defendant, in support of said motion, and Maclay, Morgan & Williams, Esqs., attorneys for the plaintiffs (C. Dickerman Williams, Esq., of counsel), in opposition thereto, and due deliberation having been had by the Court, it is

On motion of Warren E. Burger, Assistant Attorney General of the United States, attorney for the defendant herein,

Ordered that the defendant's motion be and the same hereby is granted to the extent that (1) the taking of the deposition of Joseph Campbell, Comptroller General of the United States, with the reservation to the defendant of the right to make any motion with respect to said notice and the subpoena issued in connection therewith, and (2) the taking of the deposition of William Newman, with the reservation to the defendant of the right to make any motion with respect to notice therefor and the subpoena issued in connection therewith, be and the same hereby are adjourned to and including December 29, 1955 until after the argument before this Court of defendant's pending [fol. 199] motion to dismiss the complaint herein, and (3) the time of the defendant to answer, except or make any motion with respect to the interrogatories propounded by plaintiffs to the defendant, and (4) the time of the defendant to answer plaintiffs' request for admissions or make any motion with respect to said request, be and the same hereby is extended to and including December 29, 1955 until after the argument before this Court of defendant's motion to dismiss the complaint herein, and it is

Further Ordered that such disposition as the Court may deem appropriate with respect to any further adjournments and extensions shall be made after the conclusion of argument on December 29, 1955 of the pending motion to dismiss the complaint herein.

Dated: New York, N. Y.
December 23rd, 1955

Lawrence E. Walsh, United States District Judge.

[fol. 200] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Excerpts from Hearings Before Judge Walsh—December 29, 1955

New York, December 29, 1955,
2:45 o'clock p.m.

* * * * * * *

[fol. 201] Mr. Seaver: I do not believe we will file any unless, of course, there was something in his brief which requires it.

Your Honor, there is one remaining item of business, and that is the further extension of the time within which the depositions are to be taken, and all these things that were stayed until today.

Mr. Williams: Well now, your Honor, I might say that we have filed a request for admissions. In that request for admissions, most of them, namely, Nos. 1 and 7 through 12 inclusive involve official publications of the United States of the same kind that Mr. Colby put in his affidavit. For instance, these budget programs. Here I have simply [fol. 202] photostatic copies of official publications which are admissible as such, and just as Mr. Colby stuck in a lot of things of that kind into his affidavit I would ask that these proposed admissions, which I say are photostatic copies of official publications, be regarded as admissions. They are somewhat remote, but your Honor might find them useful.

The Court: I think Mr. Seaver is talking about—you are not talking about matters for this motion; you want to tender something further on this motion?

Mr. Williams: Your Honor, this is already before the Court. It is in the court file. It is called requests for admissions, and I refer to some of these admissions in a couple of places.

The Court: Now, is there any objection to continuing the stay of the proceedings in the case until I decide this motion?

Mr. Williams: I would not object to continuing the stay. I object to this 30-day request. I see no reason why they should be given any additional time more than that allowed by the Rules of Civil Procedure.

[fol. 203] Mr. Seaver: We will not request that. I think when this motion is decided there will be no occasion to continue this.

The Court: All right, I will continue the stay until the disposition of the motion.

Mr. Seaver: May we supply an order setting out this further extension of the time?

The Court: Yes.

Mr. Seaver: Thank you, your Honor.

Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 204] [File endorsement omitted]

[Title omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

ORDER RE: TAKING FURTHER DEPOSITIONS, ETC.—January 4, 1956

The defendant having moved to dismiss the complaint herein, and an order having been made and entered herein on December 22, 1955 extending the time of the defendant to serve and file affidavits in answer to plaintiffs' pending motion for summary judgment returnable on January 5, 1956, to December 29, 1955, after argument on defendant's motion to dismiss the complaint; and an order having been made and entered herein on December 22, 1955, adjourning the date set for the taking of the deposition of Comptroller General Joseph Campbell to December 29, 1955, with the reservation to the defendant of the right to make any motion with respect to the notice and subpoena issued in connection with the notice, and adjourning the date set for the taking of the deposition of William Newman to December 29, 1955, with the reservation to the defendant of the right to make any motion with respect to the notice therefor and the subpoena issued in connection therewith, and extending to December 29, 1955 the time of the defend-

ant to answer, except or make any motion with respect to the interrogatories propounded by the plaintiffs to the defendant, and extending to December 29, 1955 the time of [fol. 205] the defendant to answer plaintiffs' request for admissions or make any motion with respect to said request; and defendant's motion to dismiss the complaint having been heard by this Court on December 29, 1955, and the Court having reserved decision on said motion, it is,

On motion of Warren E. Burger, Assistant Attorney General of the United States, attorney for the defendant herein,

Ordered that the adjournments, extensions and reservations provided for in the orders entered herein on December 22, 1955 be and the same hereby are further extended to and including the date of the determination by the Court of the defendant's pending motion to dismiss the complaint; and it is

Further Ordered that in the event of the denial of defendant's motion to dismiss the complaint herein, such provisions as the Court may deem appropriate with respect to any further adjournments and extensions shall be made by the Court.

Dated, New York, N.Y. January 4th, 1956.

Lawrence E. Walsh, United States District Judge.

[fol. 206] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

GRACE LINE, INC., et al., Plaintiffs,

against

PANAMA CANAL COMPANY, Defendant

OPINION—June 28, 1956

APPEARANCES:

Maclay, Morgan & Williams, Esqs., Attorneys for Plaintiffs, 76 Beaver Street, New York 5, N. Y.

C. Dickerman Williams, Bernard Schwartz, J. Stewart Harrison, William I. Stoddard, Esqs., Of Counsel

Brobeck, Phleger & Harrison, Esqs., Associate Counsel, 111 Sutter Street, San Francisco 4, Calif.

Warren E. Burger, Esq., Assistant Attorney General, Attorney for Defendant, United States Courthouse, Foley Square, New York 7, N. Y.

Leavenworth Colby, Esq., Chief Admiralty and Shipping Section, Department of Justice; E. Robert Seaver, Esq., Attorney in Charge, N. Y. Office, Admiralty and Shipping Section, Department of Justice; Benjamin H. Berman, Esq., and George Jaffin, Esq., Attorneys, Department of Justice, Of Counsel.

WALSH, *D. J.*:

[fol. 207] This is an action by a group of steamship lines to compel defendant to prescribe new tolls for the Panama Canal and for damages based upon its collection of allegedly excessive tolls. Defendant moves to dismiss the complaint, claiming that the court has no jurisdiction over the subject matter because (1) the prescription of new tolls is discretionary; (2) plaintiffs have no standing to sue; and (3) defendant's action is subject to the approval of the President.

The statute in question is Sections 411 and 412 of the Canal Zone Code [1] which reads:

> "411. Authority to Prescribe Measurement Rules and Tolls.——
>
> The Panama Canal Company is authorized to prescribe and from time to time change (1) the rules for the measurement of vessels for the Panama Canal, and (2), subject to the provisions of the section next following, the tolls that shall be levied for the use of the Panama Canal: *Provided, however,* that the rules of measurement, and the rates of tolls, prevailing on the effective date of this amended section shall continue in effect until changed as provided in this section: *Provided further,* that the said corporation shall give six months' notice, by publication in the Federal Register, of any and all proposed changes in basic rules

[1] Act of September 26, 1950, C. 1049, 64 Stat. 1038, 1042, which amended 48 Stat. 1122 (1934).

of measurement and of any and all proposed changes in rates of tolls, during which period a public hearing shall be conducted: *And provided further*, That changes in basic rules of measurement and changes in rates of tolls shall be subject to, and shall take effect upon, the approval of the President of the United States, whose action in such matter shall be final and conclusive."

[fol. 208] "412. Bases of Tolls.——* * *

"(b) Tolls shall be prescribed at a rate or rates calculated to cover, as nearly as practicable, all costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto, including interest and depreciation, and an appropriate share of the net costs of operation of the agency known as the Canal Zone Government. * * *".

It is incidental to the authorization for the transfer of the Canal to the defendant by the President and took effect upon the execution of that transfer on July 1, 1951.[2] Until then the Canal had been administered as an independent agency, under the Secretary of War and the Secretary of the Army.

Defendant is a government corporation, reorganized in 1948 to conform with the Government Corporation Control Act.[3] Its predecessor, the Panama Railroad Company, had been a New York corporation, organized in 1849 for the purpose of constructing a railroad across the Isthmus. The United States had acquired all of its stock from the French stockholders who had previously attempted to dig the Canal. Until 1950, defendant operated facilities incidental to the Canal, such as a railroad, steamship line, dry docks and hotels, but it did not operate the Canal itself.

[fol. 209] The United States, as owner of the defendant, is represented by the President or such other officer of the United States as he may designate. The President or the designated officer is known as the stockholder. The Board of Directors is appointed by and holds office at his pleasure,

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[2] Exec. Order No. 10263, 16 Fed. Reg. 6333 (1951).

[3] 31 U.S.C.A. § 869(b). The Act reincorporating defendant is Act of June 29, 1948, C. 706, 62 Stat. 1075.

except that the Governor of the Panama Canal[4] Code must be a director and president of the corporation.[5]

The transfer of the Canal was in furtherance of a plan to make the commercial facilities of the Canal self-supporting.[6] It was authorized upon a recommendation of the Bureau of the Budget to separate the facilities for the service of commerce from those required for national defense and the police functions of the Canal Zone Government, and to get the former under the business like accounting and budget control which a government corporation is permitted to use rather than those required of government departments.[7] It was precipitated by the belief that an increase [fol. 210] in Canal tolls was necessary, and one had actually been proclaimed by the President although it was deferred pending consideration of the legislation.[8] It was hoped that the statute would establish a permanent tolls policy which would permit periodic adjustment of tolls, to keep the commercial facilities of the Canal self-supporting and make it most useful to commerce.[9]

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[4] The President is authorized to govern the Canal Zone or cause it to be governed by a Governor whom he appoints by and with the advice and consent of the Senate for a four year term. Canal Zone Code §§ 5, 6.

[5] 62 Stat 1077 (1948).

[6] Bureau of the Budget Report, H. Misc. Doc. 460, 81st Cong., 2d Sess., 13-16 (1950); S. Rep. No. 2531, 81st Cong., 2d Sess. 4 (1950).

[7] Ibid.

[8] Proclamation No. 2775 (1948). The effective date was deferred by Proclamation Nos. 2808 (1948), 2831, 2852 (1949), 2875 (1950), and the original Proclamation was revoked by Proclamation No. 2903 (1950) when the new statute was enacted. Prior to the 1950 amendment, the President had power to change the rate of tolls between fixed limits at any time upon six months' notice. Canal Zone Code of 1934 § 411.

[9] The House Report speaks of a "definite and permanent Panama Canal tolls policy" and the need for legislation "establishing tolls policy". H. Rep. 2935, 81st Cong., 2d

[fol. 211] There is no question but that new tolls, if they are prescribed, must conform with Section 412. The first question is whether the statute which "authorized" the fixing of flexible toll rates in accordance with this section, mandated a change to toll rates so computed, or whether it left to the discretion of the defendant, the continuation of the prevailing rates for an indefinite period of time. Plaintiffs claim that Section 411 mandates the prescription of new tolls in accordance with the formula contained in Section 412; that plaintiffs, as users of the Canal, have a right to transit at these prescribed tolls, that execution of the formula of Section 412 would result in a reduction in toll rates; and that the continuation of the previous tolls constitutes an unlawful exaction for the exercise of this right. It is assumed for the purpose of this motion that tolls prescribed pursuant to Section 412 would be lower than those now prevailing, but defendant contends that under such circumstances it was left with the discretion to keep the prevailing toll rates in effect.

It is my conclusion that the statute did not compel prescription of tolls under the statutory formula as long as defendant was content with the then prevailing tolls. It

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Sess., 4, 6 (1950). The Report of the Bureau of the Budget states:

> "While the tolls rate should not be changed on a year-to-year basis since 1 year's experience is insufficient to reflect accurately long-range trends, the rate should be adjusted periodically as changes take place in the factors that determine the charges that should be made for the use of the Canal. As the 1937 special committee expressed it:
>
> > 'Economic and commercial conditions are not static. The Panama Canal is a facility for the service of interoceanic commerce. The charges for the service should receive such adjustments from time to time as will keep the charges in harmony with the needs of the Canal and the requirements that must be met in making the Canal the servant and assistant of international intercourse.' ".
>
> (H. Misc. Doc. No. 460, 81st Cong., 2d Sess., 16, 1950)).

fixed no time within which the new tolls were required to be prescribed. It expressly provides for the continuation [fol. 212] of the prevailing tolls until changed by the defendant. Its language giving power to prescribe new tolls under the statute is permissive in form; it "authorizes" the prescription of new tolls.[10] When the present provision is read against the pre-existing one, it is apparent that the language "is authorized to prescribe and from time to time change" is identical with the language formerly authorizing the fixing of tolls by the President, whose power was indisputably discretionary.[11] The discriminating use of the permissive form in Section 411 and the mandatory form "shall" in Section 412 manifests an intent to make this language permissive.[12] In addition, [fol. 213] grammatically, the phrase subjecting tolls to the statutory formula, "subject to the provisions of the section next following," modifies the words "prescribe" and "change" not "authorize". Consequently, it is a limit on

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[10] See *United States ex rel McLennan* v. *Wilbur*, 283 U. S. 414, 418, 420:

> "* * * The law must not only authorize the demanded action, but require it; the duty must be clear and indisputable." (p. 420).

See also *United States ex rel Simons* v. *Hines*, C.A.D.C., 69 F. 2d 229; Cf. *Red Canyon Sheep Co.* v. *Ickes*, C.A.D.C., 98 F. 2d 308, 313-314.

[11] The former language of Section 411 provided:

> "The President is authorized, subject to the provisions of the section next following, to prescribe and from time to time change the tolls that shall be levied by the Government of the United States for the use of the Panama Canal, but no tolls when prescribed as above shall be changed unless six months' notice thereof is given by the President by proclamation." (Canal Zone Code of 1934, §411).

[12] *United States ex rel McLennan* v. *Wilbur*, 283 U.S. 414; *United States ex rel Zapp* v. *District Director of Immigration*, 2 Cir., 120 F. 2d 762, 764-5.

the extent of change not the decision whether to change or not. The essential language is as follows:

> "The Panama Canal Company is authorized to prescribe and from time to time change * * *, subject to the provisions of the section next following, the tolls that shall be levied for the use of the Panama Canal. * * * ".

In amending the section Congress did not leave that phrase in its original position immediately following the word "authorize" but moved it away from that word to a position after the words "prescribe" and "change".[13] Such a transposition was quite evidently a precaution against the very ambiguity which plaintiffs are now trying [fol. 214] to read into the statute.[14]

The legislative history is consistent with this construction of the statute's language. Congress in all probability expected that the new formula would be resorted to as soon as defendant could conveniently make the required studies and computations because it had been informed that the new formula would produce more revenue than the prevailing toll rates. Congress did not, however, suggest or consider *compelling* defendant to depart from the then prevailing tolls. It assumed defendant would do so voluntarily. The expectation that tolls would be increased

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[13] The section formerly read:

> "The President is authorized, subject to the provisions of the section next following, to prescribe and from time to time change * * * ".

[14] The change in the modifying position of the "subject to" clause was not necessary to enable Congress to subject tolls to section 412 without subjecting rules for the measurement of vessels. By an easy rearrangement of the words of the former provision it could have provided:

> "The * * * Company is authorized to prescribe and from time to time change the rules for the measurement of vessels, and, subject to the provisions of the section next following, it is authorized to prescribe and from time to time change the tolls. * * * ".

[fol. 215] is spread through the reports of the Congressional Committees and their hearings.[15] The estimate submitted to Congress by the Bureau of the Budget was that a five cent per ton increase would be required by the statutory formula,[16] and Congressional discussions centered primarily on proposed restrictions to prevent it from going substantially higher.[17]

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[15] See for example Statements of Former Senator Joseph Ball, representing the Association of American Ship Owners; Colloquy during Statement of Gregory Prince, representing the Association of American Railroads; Hearings before the Subcommittee on the Panama Canal of the Committee on Merchant Marine and Fisheries, House of Representatives on H. R. 8677, 81st Cong., 2d Sess., 80, 141 (1950); Statement of Harold Seidman, accompanied by Russell Roane, representing the Bureau of the Budget; Colloquy during statement of Joseph Ball, Vice President, Association of American Ship Owners; Hearing before a Subcommittee on the Committee on Armed Services, United States Senate on H. R. 8677, 81st Cong., 2d Sess., 8, 17-18 (1950).

[16] The report of the Senate Committee on Armed Services states that:

> "* * * The committee inquired into the effect of this legislation on the existing tolls which are now set at 90 cents a vessel-ton, as well as the amount of interest that would be paid into the Treasury under the new bill. * * *.
>
> "Testimony of the representatives of the Bureau of the Budget indicated that under prevailing conditions the application of the provisions of this bill, as amended, would probably result in a tolls rate of about 95 cents per net vessel-ton. This is derived from the following data: * * *".
>
> [S. Rep. No. 2531, 81st Cong., 2d Sess. 5 (1950)].

[17] The principal controversies concerned a proposal for a $1 maximum limit which was defeated, [Hearing before a Subcommittee of the Committee on Armed Services, United States Senate on H. R. 8677, 81st Cong., 2d Sess., 5, 9, 10, 16, 27-28 (1950); Hearings before the Subcommittee on

[fol. 216] Although on one occasion a spokesman of the Bureau of the Budget spoke of the bill as providing that the Company "shall prescribe" toll rates in accordance with the statutory formula,[18] equally important statements

In several instances persons appearing before the Senate Committee referred to the new tolls as being "required". In each instance the witness was describing the effect of Section 412 not 411. He was stating, in substance, that Section 412 "required" prescription of tolls at a particular rate. [Hearings before a Subcommittee of the Committee on Armed Services, United States Senate on H. R. 8677, 81st Cong., 2d Sess., 8, 10, 12, 26 (1950)]. There is no question that if tolls are to be prescribed they are required to conform to section 412. The question is whether section 411 requires that they be prescribed.

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the Panama Canal of the Committee on Merchant Marine and Fisheries, House of Representatives on H. R. 8677, 81st Cong., 2d Sess., 80 (1950)] and the proposal to eliminate interest during construction from the capital cost of the Canal which was accepted and which it was believed would result in only a five cent per ton increase instead of fifteen cents per ton. [Hearings before the Subcommittee on the Panama Canal of the Committee on Merchant Marine and Fisheries, House of Representatives on H. R. 8677, 81st Cong., 2d Sess., 51, 52-3, 56, 78 (1950); Hearing before a Subcommittee of the Committee on Armed Services, United States Senate on H. R. 8677, 81st Cong., 2d Sess., 8 (1950)].

[18] Statement of Harold Seidman before a Subcommittee of the Committee on Armed Services, United States Senate, op. cit. 7:

> "H. R. 8677 provides that the Panama Canal Company shall prescribe the toll rates in accordance with a formula established in section 14 of the bill, subject to the President's approval. The Company, as under present law, would be required to give 6 months' prior [fol. 217] notice of any proposed changes in rates, and, in addition, to conduct a public hearing on the proposed changes."

regarding the language of Section 411 speak of it in a permissive sense.[18a] The principal spokesman for the steamship lines described it as a transfer of the President's [fol. 218] authority rather than a contraction of it.[19] Fur-

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[18a] Statement of Hon. Francis R. Newcomer, Governor of the Canal Zone, and President of the Panama Railway Co., Hearings before the Subcommittee on the Panama Canal of the Committee on Merchant Marine and Fisheries, House of Representatives on H. R. 8677, 81st Cong., 2d Sess., 30 (1950):

> "14. Sections 24 and 25 of the bill would amend the existing tolls sections (secs. 411 and 412, respectively, of title 2, Canal Zone Code) in such manner as to vest in the corporation the authority to fix measurement rules and tolls, and to prescribe the bases of tolls. * * *".

The Report of the House Committee on Merchant Marine and Fisheries stated:

> "The Directors of the Company will be authorized, by this bill, to establish toll rates subject to the President's approval. Such rates will be finally set only after notice and public hearing. * * *".
> [H. Rep. No. 2935, 81st Cong., 2d Sess., 3 (1950)].

[19] Statement of Former Senator Joseph Ball, representing the Association of American Ship Owners, Hearings before the Subcommittee on the Panama Canal of the Committee on Merchant Marine and Fisheries, House of Representatives on H. R. 8677, 81st Cong., 2d Sess. 76 (1950):

> "We have no objection to section 24, which transfers the authority to fix tolls and basic rules of measurement to the Panama Canal Company, subject to final approval by the President. The transfer of authority retains the present provision in the law requiring six months' notice, by publication in the Federal Register, of any proposed change in toll rates or measurement rules."

The President had complete discretion as to when to change tolls under the former statute.

ther, although the House Report speaks of the statute as "establishing tolls policy",[20] there was express recognition in the hearings and in the debate that defendant might delay the imposition of new tolls and that Congress could control such action or non-action upon review of its budget.[20a]

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[20] H. Rep. 2935, 81st Cong., 2d Sess. 4, 6 (1950).

[20a] Statement of Harold Seidman, Bureau of the Budget, House Hearings on H. R. 8677, at pp. 49-50:

"Mr. Shelly. On page 5 in the last sentence of the second paragraph you say:

'The Congress will, of course, have an opportunity to examine the tolls policy in connection with its review of the business type budget to be submitted annually by the company.'

"Can you elucidate on that a little more; it is more of a possible review of it?

[fol. 219] "Mr. Seidman. No; it is a going review. That, we believe, is one of the advantages of the new arrangement—that the Panama Canal Company will come in with a business type budget which is more informative and will pertain to a business operation more than the present budget. It is not merely a question of a request for appropriations; or how much they spent last year. It is an excellent statement of financial condition—income and expense, capital expenditures, as distinguished from operating expenses, and so forth.

"Congress, in going over that, would be able to determine—are the rates high enough to cover the cost of operation? That would be indicated in the budget statement which would be practically a balance sheet, or, on the other hand, you might say, 'Your revenues are far exceeding your cost of operation and you should consider changing your policy with respect to rates.'

"Also, of course, the Congress may act upon how much should be paid in dividends by the corporation.

"Mr. Shelly. It is in the review by Congress we are to determine the budget submitted, which will be in advance of the levying of the tolls.

"Mr. Seidman. That is right. You would not change

[fol. 220] It is also noteworthy that Congress permitted a bill to die which would have expressly required the Governor of the Canal to report proposed rates under a similar new formula within sixty days,[21] and that it failed to act upon the request of a representative of the steamship lines that a Congressional Committee be designated a

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the rates from year to year in any event. I think over a period of years, seeing what the income statement was and the expense statement, you could determine from that whether the tolls were too high or too low, or what the reasons were for the toll policy. *There may be many reasons why the Congress might have the Canal operate at a loss for a certain period, or at a profit, depending upon the circumstances.*" (Emphasis supplied).

Statement in debate by Representative O'Toole, 96 Cong. Rec. 13372 (1950):

"* * * The bill, if enacted, will permit a board of directors to know the sources and amounts of revenue in the Canal enterprise. It will, under well-established corporate control methods, give the Congress a thorough and complete accounting for these business functions on an annual basis, and will present annually to the Congress a budget reflecting all the revenues and expenses of these many business enterprises. While the Board of Directors of the proposed Panama Canal Company will have normal powers, matters of policy will be controlled by the Congress through the annual budget submitted to the Congress under the Government Corporation Control Act of 1945".

[21] S. 3650, 81st Cong., 2d Sess., Senator Magnuson; the last bill section reads:

"Sec. 2. The Governor of the Canal shall report to the President and to the Congress not later than sixty days after the date of enactment of this Act a schedule of proposed toll rates, computed in compliance with the amendment made by this Act, including the detailed factors used in determining such rates."

"watchdog" to receive at regular intervals suggestions by [fol. 221] the steamship industry as to the execution of the Act.[22]

At the heart of any consideration of the nature of the duty imposed upon the defendant, as well as the other questions raised by this motion, is the power entrusted by Congress to the President with respect to the Canal in general and its tolls in particular. Section 411, itself, gives the President unrestricted power to block any change in tolls. And his unrestricted control over the appointment and removal of defendant's directors, gave him full power to compel them to perform any duty with respect to the prescription of toll rates to which the statute might subject them.[23] No objection was expressed to the

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[22] Statement of Frazer A. Bailey, President of the National Federation of American Shipping, Inc., Hearings before the Subcommittee on the Panama Canal of the Committee on Merchant Marine and Fisheries, House of Representatives, on H. R. 8677, 81st Cong., 2d Sess., 61-62 (1950):

> "Following the precedent in the case of the administration of the ECA Act, we suggest that this Committee constitute itself into a 'watchdog committee', that the Canal authorities be required to submit reports at regular intervals, and that the industry be permitted to present its suggestions in the interest of effectively carrying out the provisions on H. R. 8677 and of congressional intent."

[23] The only restriction upon the President's selection of the defendant's stockholder is that he be a public officer. The designation is at the pleasure of the President in the absence of any provision to the contrary. *Myers* v. *U. S.*, 272 U. S. 52, 161; *Bailey* v. *Richardson*, C.A.D.C., 182 F. 2d 46, 58, aff'd. 341 U. S. 918; *Board of Directors of City Trusts* v. *Maloney*, C.A.D.C., 141 F. 2d 275, cert. den. 323 U. S. 714.

The appointment of members of defendant's board is not subject to the advice and consent of the Senate. Members serve at the pleasure of the stockholder.

[fol. 222] continuation of his control.[24] Indeed, it was pointed to as one of the bill's two important safeguards, the other being Congressional control of the defendant's [fol. 223] budget.[25] The interposition of the defendant in the toll making procedure was as an aid to the President not as a restriction upon him. It was to delegate the "almost ministerial" aspects of this work to an agency with an adequate staff for this work.[26]

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[24] The President was not even mandated to transfer the Canal to defendant; under the statute he could have continued to operate the Canal as an independent agency with his old power with respect to tolls. 64 Stat. 1042 (1950).

[25] Statement of Harold Seidman, Bureau of the Budget, Hearings before a Subcommittee of the Committee on Armed Services, United States Senate on H. R. 8677, 81st Cong., 2d Sess., 7 (1950):

> "There are two important safeguards provided in the bill. The first is the requirement for a public hearing and the second for Presidential approval. Since tolls may have an effect on national transportation policy, review and approval of the rate by the President is believed essential. The Congress will, of course, have an opportunity to examine tolls policy in connection with its review of the business-type budget to be submitted annually by the Company."

[26] The Bureau of the Budget stated in its report:

> "At the policy level the programs of the Panama Canal and the Panama Railroad Company have their most significant impact in the transportation area. Actions taken by the Canal may vitally affect not only world trade and shipping but also intercoastal trade and transcontinental railroads. The question of toll rates, for example, raises important issues which should be reviewed in the light of the objectives of national transportation policy. Neither the Secretary of Defense nor the Secretary of the Army has at the present the departmental responsibility or the staff resources to deal adequately with policy issues of this character. Military-staff channels are not and should

[fol. 224] It was intended that after defendant prescribed tolls on the basis of the factors which determine how high a toll must be to cover the cost of service, the broader questions of the needs of the national transportation policy and foreign policy would be left as an unlimited delegation [fol. 225] to the President.[27] Defendant is no more than

not be used for this purpose. In the absence of other staff facilities, the Secretary of the Army has been compelled to rely almost exclusively on his administrative assistant, who has numerous other important duties, and the Washington Office of the Panama Canal for assistance on Panama Canal matters.

"Establishment of a special Panama Canal staff in either the Office of the Secretary of Defense or the Secretary of the Army would offer only a partial solution to the problem and might well further complicate coördination of transportation policy. * * *". [The Bureau's recommendation for a complete solution, that this function be given the Secretary of Commerce, was not followed.]

In support of its recommendation that the President be relieved of the work of applying the statutory formula it said:

"Provided that there is agreement as to the formula for establishing the tolls rates and adequate business-type accounts and financial reporting, the actual setting of the tolls rate becomes almost a ministerial function which could well be delegated to the corporation's board of directors. However, since the tolls rate may have an effect on national transportation policy, review and approval of the rate by the President is essential."

(H. Misc. Doc. No. 460, 81st Cong., 2d Sess., 11, 16 (1950).)

[27] See footnotes 25 and 26, *supra*.

The State Department was concerned that there be no violation of the Treaty of 1901 with Great Britain. [Hearings before the Subcommittee on the Panama Canal of the Committee on Merchant Marine and Fisheries, House of Representatives on H. R. 8677, 81st Cong., 2d Sess., 43, 85-86 (1950)].

a corporate subordinate of the President and the act here in question is subject to the control and nullification by the President. Under such circumstances the courts will not construe it as ministerial. *Marbury* v. *Madison*, 1 Cranch (5 U. S. 137, 170;[28] see also *United States ex rel McLennan* v. *Wilbur*, 283 U.S. 414, 418, 420.

[fol. 226] The courts will, by mandamus, compel an officer to exercise discretion when he has failed to do so because of a misconception of law, *McGrath* v. *Kristensen*, 340 U.S. 162; *Gutnayer* v. *McGranery*, D.C.D.C., 108 F. Supp. 290, modified and affirmed sub. nom. *Brownell* v. *Gutnayer*, C.A.D.C., 212 F. 2d 462; or because of disregard of the statutory standards for the exercise of his discretion, *United States ex rel Accardi* v. *Shaughnessy*, 347 U.S. 260, 268. But mandamus cannot be had to compel the exercise of judgment or discretion in a particular way or to direct the retraction or reversal of action already taken in the exercise of judgment or discretion. *I.C.C.* v. *United States ex rel Members of Waste Merchants Ass'n. of N.Y.*, 260 U.S. 32, 34; *Wilbur* v. *United States ex rel Kadrie*, 281 U.S. 206, 218. Unless plaintiffs merely seek to have defendant formalize its views on tolls, a step not required by the statute, there could be no possible use of mandamus here except

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[28] "* * * Where the head of a department acts in a case, in which executive discretion is to be exercised, in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct would be rejected without hesitation. But where he is directed by law to do a certain act, affecting the absolute rights of individuals, *in the performance of which he is not placed under the particular direction of the President*, and *the performance of which the President cannot lawfully forbid*, and therefore, is never presumed to have forbidden; as, for example, to record a commission or a patent for land, which has received all the legal solemnities; or to give a copy of such record; in such cases, it is not perceived, on what ground the courts of the country are further excused from the duty of giving judgment that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department." (p. 170). (Emphasis supplied).

to compel the defendant to act in a particular way, to compel it to prescribe tolls upon a formula it has in its discretion declined to use. Mandamus will not lie to direct discretion in this manner. *United States ex rel Roughton* v. *Ickes*, C.A.D.C., 101 F. 2d 248, 253. Here the discretion given defendant as to whether to change to the new formula is so unrestricted that even if its action could be regarded as [fol. 227] final rather than advisory to the President, there could be no legislative standard applicable as a basis for court interference as long as defendant earns enough revenue to carry out the Canal functions contemplated by the statute.[29] Accordingly the complaint must be dismissed for lack of jurisdiction over the subject matter.

Even though defendant's duty were held to be mandatory rather than permissive it would be necessary to dismiss the complaint because (1) the action of defendant, being subject to nullification by the President, lacks finality and (2) plaintiffs lack standing to sue.

Even when an administrative agency is independent of the President, its duty to act mandatory, and its determination otherwise reviewable, if its determination is subject to Presidential nullification the court will not review it. Such a determination lacks finality in the sense that the action of the court will not determine any right of the parties. The court cannot control whether the determination of the agency, once given, is heeded or disregarded by the President. Such an administrative order has been held merely advisory and not reviewable, either as to the correctness of the advice or for errors of law. *C. & S. Airlines* v. *Waterman Corp.*, 333 U.S. 103; *Trans World Air-Lines* v. *Civil Aeronautics Board*, 2 Cir., 184 F. 2d 66; *Pan American Airways Co.* v. *Civil Aeronautics Board*, 2 Cir., [fol. 228] 121 F. 2d 810; *Employers Group, Etc.* v. *National War Labor Board*, C.A.D.C., 143 F. 2d 145, 151, cert. den. 323 U.S. 735.[30]

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[29] Cf. *Supervisors* v. *United States*, 4 Wall 435.

[30] *McGrath* v. *Kristensen*, *supra*, 340 U.S. 162, must, of course, be distinguished. In that case the court compelled the Attorney General to exercise his judgment as to whether an alien was worthy of relief by Congress from deporta-

Plaintiffs attempt to distinguish the Civil Aeronautics Act cases because the statute involved (Section 801, 49 U.S. C.A. § 601) expressly required the President's approval of Board action when an application was denied as well as when it was granted.[31] They claim that here the President has only a veto power and that accordingly action by the defendant was final, unless a change in tolls was prescribed. Such a claim places too nice a reliance upon the independence of the defendant's directors from the sole stockholder at whose pleasure they serve. The President, directly as stockholder or through his designee, had ample power to compel defendant to prescribe new toll rates for his consideration if he wanted it to do so. If the President, himself, [fol. 229] were defendant's stockholder, he could not obtain mandamus without first exercising his powers as stockholder. The fact that these powers are held by a designee is not significant; the designee also serves at the President's pleasure.[31a] The corporate policy in issue is of major importance. Removal for difference of view on such a matter would not be such a clumsy means of controlling defendant's action as to be ineffective, particularly in the light of Congress's express reliance on the President's approval of any change. Certainly need for interference by the courts is not great enough to require departure from the position the courts have so persistently and emphatically stated, that they will not act when their action may

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tion even though Congress might ultimately disregard his recommendation. In that case, however, the Attorney General's action was not without effect pending action by Congress. It carried finality as to a stay of deportation up to six months and on this basis the court distinguished *C. & S. Airlines* v. *Waterman Corp.*, *supra.*, 340 U.S. at p. 168. There also Congress had no easily effective means of compelling the Attorney General to advise it.

[31] For a comparable implication of power of the President with respect to non-action see *Trans-World Airlines* v. *Civil Aeronautics Board*, *supra.*, 2 Cir., 184 F. 2d 66, pp. 70-71.

[31a] See footnote 23, *supra.*

be nullified by the executive before it can affect the rights of the parties before it.[32]

[fol. 230] Even if it could be said that defendant's duty to prescribe rates is mandatory, plaintiffs lack standing to sue. To have standing, they must allege a violation of a recognized legal right.[32a] The complaint alleges that defendant has compelled plaintiffs to pay tolls at rates in excess of the standards provided by the 1950 statute, but there is no basis for their claim that they are entitled to [fol. 231] transit the Canal at such tolls. Plaintiffs argue that defendant is analogous to a public utility exacting an unreasonable charge and assume, without supporting authority, that a person has the same right to the use of

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[32] See *C. & S. Airlines* v. *Waterman Corp., supra.*:

> "* * * It has also been the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action. * * *". (333 U.S. 113-114).

See *Gordon* v. *United States*, 117 U.S. 697, 702:

> "Congress [cannot] authorize or require this court to express an opinion on a case where its judicial power could not be exercised, and where its judgment would not be final and conclusive upon the rights of the parties and process of execution awarded to carry it into effect. * * * [The judgment] would be merely an opinion, which would remain a dead letter, and without any operation upon the rights of the parties, unless Congress should at some future time sanction it, and pass a law authorizing the court to carry its opinion into effect. Such is not the judicial power confided to this court. * * *".

[32a] *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 125; *Tennessee Power Co.* v. *TVA.*, 306 U.S. 118, 137; Alabama *Power Co.* v. *Ickes*, 302 U.S. 464, 479; Concurring opinion of Mr. Justice Frankfurter, *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 150-57.

the Canal as to the services of a common carrier.[33] Assuming, however, that plaintiffs have a right to use the Canal,[34] they were given no right to have tolls fixed in accordance with the formula of Section 412. In the absence of a statute there is no right by users to have tolls fixed at a particular

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[33] No one questions that in the absence of a statute a shipper has a common law right to the service of a common carrier without unreasonable exactions. Cf. *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 436; *Lewis, Etc. Co.* v. *Southern Pac. Co.*, 283 U.S. 654; *Munn* v. *Illinois*, 94 U.S. 113, 122. Nor is there any doubt that the defendant as a government corporation is liable for the commission of torts substantially to the same extent as a private corporation. Cf. *Amy* v. *The Supervisors*, 11 Wall (78 U.S.) 136, 138. By statute defendant is expressly made subject to suit and actions against it have been upheld on previous occasions. Canal Zone Code § 248; 62 Stat. 1078 (1948); *Panama R. Co.* v. *Curran*, 5 Cir., 256 F. 768, 771-72; *Panama R. Co.* v. *Minnix*, 5 Cir., 282 F. 47, 50; See also *The Bank of the United States* v. *Planters' Bank of Georgia*, 9 Wheat. (22 U.S.) 904, 907 (1924).

[34] The Canal Zone Code does not expressly give the right to anyone to use the Canal. Its use and operation are left to regulations by the President. Canal Zone Code § 9. These regulations also do not express a right to use the Canal by any person, but contain extensive and detailed restrictions as to its use. By treaty with Great Britain on November 18, 1901, it was agreed that:

> "1. The canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable. * * *". (32 Stat. 1903).

It is assumed that a person complying with the regulations of the President has a right to use the Canal.

rate.[34a] The statute contains no expression of such a pri-
[fol. 232] vate right. Nor is there any mention of such a right in its legislative history. Congress was concerned with the effect of toll rates upon the national transportation policy as well as with their sufficiency to cover the cost of Canal operation. Although the formula in Section 412 constitutes a complete legislative scheme for the computation of toll rates which will make certain facilities of the Canal self-supporting, no complete standards were enacted for the implementation of the national transportation policy or the preservation of the competitive balance between steamships and railroads. Because of the significance of
[fol. 233] Canal tolls in this respect, the President was given power to disapprove any prescribed change, even though it might conform exactly with the statutory formula.[34b] This power of the President was unrestricted and expressly final and conclusive. Under such circumstances, how can plaintiffs be said to have a right to transit the Canal at rates fixed pursuant to Section 412?

Neither was it Congress's apparent intent to give plaintiffs standing to compel the performance of defendant's advisory function for the President. Congress relied upon the supervision of the President and its own control of defendant's budget to prevent arbitrary action by defendant.[35] In this regard, it is particularly significant that the statute lacks any provision for the initiation of a proceeding for a change in tolls upon complaint of a user, and that the decision not to change tolls need not be based upon any record or hearing. The only requirement for a hearing is *after* notice that a change in tolls has been proposed. Further, the hearing is not one to provide a
[fol. 234] basis for the determination of the rights of users, or or one which will formulate a record upon which a court may review the compliance with the statutory standard. It is of the legislative type, in which an opportunity is given to the public to express its views, but which does not limit

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[34a] *G. T. McGovern Trucking Co.* v. *Moses* (Sup. Ct.), 92 N.Y.S. 2d 550, aff'd. 277 App. Div. 758, 97 N.Y.S. 2d 395; *Lawless* v. *Duval County*, S. D. Fla., 6 F. Supp. 303.

[34b] See footnotes 25 and 26, *supra*.

[35] See footnotes 20 and 25, *supra*.

action to the views expressed.[36] In such a hearing a user of the Canal is given no different standing from any other person.

Defendant also contends that the action is necessarily one against the government. If it is only the President and not the defendant who could make effective the relief plaintiffs seek, the action would be one to be brought against the government and not against defendant. To the extent that plaintiffs' action is based upon the collection of excessive tolls, such is the case. The government never having consented to be sued, and the President being immune from suit,[37] the court could not grant this relief in a suit against the defendant. To the extent that the action merely seeks to compel the defendant to perform an alleged mandatory duty owed the public, it may be that the action is properly brought against the defendant, but as [fol. 235] already explained, it must be dismissed upon other grounds.

Complaint dismissed.

Lawrence E. Walsh, United States District Judge.
June 28, 1956.

6/29 56 Judgment Entered, William V. Connelly

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[36] See *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294; *United States* v. *Bush & Co.*, 310 U.S. 371.

[37] *Mississippi* v. *Johnson*, 4 Wall (71 U.S.) 475, 499-501.

[fol. 236] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 111—October Term, 1956

(Argued November 13, 14, 1956)

Docket No. 24226

GRACE LINE, INC., et al., Plaintiffs-Appellants

and

NATIONAL BULK CARRIERS, INC., et al., Intervening Plaintiffs-Appellants

v.

PANAMA CANAL COMPANY, Defendant-Appellee

OPINION—April 8, 1957

Before: CLARK, Chief Judge, and FRANK[1] and HINCKS, Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, Lawrence E. Walsh, *Judge*.

Grace Line, Inc., and eleven other United States flag shipping lines, suing on behalf of all users of the Panama Canal, together with certain intervening plaintiffs, appeal [fol. 237] from a dismissal, D. C. S. D. N. Y., 143 F. Supp. 539, for want of jurisdiction, of their complaint seeking to compel Panama Canal Company to prescribe tolls as required by recent congressional legislation and to recover damages for its past failure to do so. Reversed and remanded for a judgment for plaintiffs as stated.

C. Dickerman Williams, of Maclay, Morgan & Williams, New York City (J. Stewart Harrison, of Brobeck, Phleger & Harrison, San Francisco, Cal., and William I. Stoddard, of Maclay, Morgan & Williams, New York City, on the brief), for plaintiff-appellants and intervening plaintiff-appellants.

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[1] Judge Frank heard arguments in this case, but died before this opinion was prepared.

George Cochran Doub, Asst. Atty. Gen., Washington, D. C. (Leavenworth Colby, Chief, Admiralty & Shipping Section, Dept. of Justice, Washington, D. C., Paul A. Sweeney and Herman Marcuse, Attys., Dept. of Justice, Washington, D. C., and Benjamin H. Berman, Atty. in Charge, Admiralty & Shipping Section, Dept. of Justice, New York City, on the brief), for Panama Canal Company, defendant-appellee.

Brief by James M. Estabrook, New York City, as *amicus curiae* in support of plaintiffs-appellants.

CLARK, *Chief Judge*:

This appeal concerns the power of a federal district court to compel the government corporation which operates [fol. 238] the Panama Canal to set tolls according to the new formula established by Congress in 1950 and to repay canal users several million dollars damages for excess tolls charged. It raises interesting and important questions as to judicial responsibility and authority when administrative action is dilatory or lacking.

A class action by canal users seeking this relief ended in summary judgment for the defendant below, when Judge Walsh concluded that he lacked jurisdiction over the subject matter and over an indispensable party. In brief, he interpreted the 1950 statute [2] as giving the defendant discretion to defer use of the new formula and denying judicial review of the defendant's decision. The history of toll regulation in the canal illuminates the conflicting interpretations of the most recent statute.

From 1912 to 1948 two different government bureaus operated commercial enterprises in the Canal Zone. Under 1902 legislation the President owned all the stock of Panama Railroad Company, a corporate ancestor of the present defendant which ran a railroad, a shipping line, and miscellaneous ventures. After 1912 there also existed The Panama Canal, an unincorporated agency headed by a governor whom the President appointed. This agency

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[2] Act of Sept. 26, 1950, 64 Stat. 1038, amending Title 2, §§411, 412, of the Canal Zone Code, approved June 19, 1934, 48 Stat. 1122. The Canal Zone Code does not constitute a part of the United States Code.

administered the civil government of the Canal Zone and operated the canal itself.

The President had statutory authority to fix canal tolls at his discretion between 75 cents and a dollar per laden ton, and a formula was worked out by the President, the Treasury Department, and the governor whereby tolls would be set high enough to cover operating expenses of the canal, "interest," and the cost of civil government in the Canal Zone. Canal users protested that the cost [fol. 239] formula was unfair to them, and in later years tolls were set much lower than the formula would have required. As expenses rose, the toll rate required by the formula became greater than the statutory maximum of $1.00, while the toll remained constant at 90 cents a laden ton.

Meanwhile Panama Railroad Company, which bore very little of the burden of government in the Canal Zone, continued its highly profitable operations, returning a surplus to the Treasury. The corporation made no financial reports to Congress and was not supervised by the Bureau of the Budget or the General Accounting Office. In 1948 to obtain greater financial supervision Congress reorganized the defendant's predecessor under federal law as a government corporation,[3] subjecting it to the requirements of the Government Corporation Control Act of 1945.[4] Henceforth it was required to keep books in the fashion of a commercial business for annual submission to Congress after Presidential revision, and it was to be audited periodically by the General Accounting Office, which, in turn, reported to Congress.

The same year President Truman announced a rise in canal tolls to $1.00 per laden ton to meet continuing deficits from The Panama Canal. When the shipping industry responded with severe protests the increase was deferred pending study by congressional committees and the Bureau of the Budget. A three-cornered struggle developed. The railroads wanted to prevent what they considered a subsidy to shipping—operation of the canal below "cost." The Bureau of the Budget wanted increased revenue from

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[3] Act of June 29, 1948, 62 Stat. 1075.

[4] 59 Stat. 597, 31 U. S. C. §§841-871.

the canal operation and better bookkeeping procedures. The shipping lines wanted revision of the formula for [fol. 240] determining "costs" of the canal to enable the canal to be "self-sustaining" without greatly raising tolls.

The resulting compromise is the statute now before us. Ownership of the physical properties of the canal was transferred from the governor's agency to the defendant corporation, now rechristened Panama Canal Company, which was to be operated by its board of directors like a commercial business, dealing with other government agencies on a business footing and meeting its expenditure from its own income. The cost of civil government in the Canal Zone was to be borne by the defendant, in lieu of taxes; and this cost was to be apportioned among the various business enterprises equitably, thus relieving the former heavy burden on the canal operation. As part of the new scheme, toll-making authority was transferred from the President to the defendant, and the statutory maxima and minima were removed. Tolls were to be set to cover costs, which were defined by statute for the first time; and the new cost formula was made more favorable to canal users than the previous informal arrangement of the President, the Treasury Department, and the Governor.[5]

Both Congress and the President retained some control over toll-fixing. The annual budget reports to Congress and the periodic GAO audits required under the Government Corporation Control Act would henceforth cover the operation of the canal, now that it, too, was run by the defendant. The President retained the power to appoint the members of the defendant's board of directors, and no change in tolls could be made without his approval. [fol. 241] For three years after passage of the Act the defendant submitted its annual budgets to Congress, reporting a profit from its combined operations, but not allo-

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[5] The major changes were that interest during construction was no longer included in capital investment; costs of civil government were no longer borne almost exclusively by the canal users; interest was reduced to commercial rates; and military vessels were to pay for their transits. A proposal to allocate half the cost of the canal to national defense was rejected.

cating the cost of interest or civil government among its various enterprises.[6] No objections were taken to these budgets by Congress and no steps were taken by the defendant to change toll rates. The present controversy began in 1955 when the General Accounting Office completed its audit of the defendant and reported:

> "* * * The Company, as a whole, has been self-sustaining. However, the Company did not have available for our examination an analysis to determine the financial results by activities. We have prepared such an analysis by allocating general corporate expenses (interest, net cost of Canal Zone Government and administrative and other general expenses) to the activity operating results reported by the Company. * * *
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> "The analysis of the Company, reported net income of $13,000,000 for 3 years since the reorganization shows that, contrary to the apparent expectation of the Congress, the canal activity had a net income of $28,000,000 and business activities had losses of $15,000,000. * * *
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> "* * * Thus the net income from the canal activity is being used to offset losses from business activities.
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> "* * * We interpret the legislation as precluding any losses sustained by the Panama Canal Company in the operation and maintenance of business facilities being included in the basis for determining tolls under sec- [fol. 242] tion 412(b). Based on the financial results of the canal activity for the past 3 years, toll rates would have to be reduced substantially if hearings were held at this time."[7]

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[6] Defendant's annual reports for the fiscal years ending June 30, 1952, 1953, and 1954, were attached as exhibits to an affidavit submitted by the plaintiffs. Criticism of the defendant's reports is detailed in the Comptroller General's Audit Report to the Congress of the United States on Panama Canal Company and Canal Zone Government for the Fiscal Year Ended June 30, 1955, 29-30 (hereafter cited as 1955 Audit).

[7] Report on Audit of Panama Canal-Zone Government for the Fiscal Year Ended June 30, 1954, 2-3.

The GAO attributed the loss from other business activities to inefficient management, reapportionment of the burden of civil government, and a diminished market for the goods and services of these enterprises.[8] The unexpected profit of the canal operation probably stems from the steady increase in foreign commercial volume since 1947.[9] The General Accounting Office did not believe that existing legislation authorized the defendant to continue recovering business activity losses through canal tolls and unsuccessfully sought amendment of § 412(b) of the 1950 Act to accomplish that end.[10]

Judge Walsh rejected the General Accounting Office's construction of the 1950 amendments, which the plaintiffs support, and approved that of defendant Panama Canal Company. We turn first to this question of statutory interpretation.

[fol. 243] I. Meaning of the 1950 Statute

A. Statutory Text. The old and new versions of §§ 411 and 412 are printed in the margin for comparison, since the first phase of argument concerns the significance of the

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[8] 1955 Audit, 34-36.

[9] In the four years after the transfer of the canal to the defendant, foreign toll revenues rose from $16,935,823 to $23,442,170 per year, while American tolls went from $9,986,708 to $10,407,307. 1955 Audit, 3.

Congress had recognized that future tolls would depend on the volume of traffic, *e.g.*, Sen. Rep. No. 2531, 81st Cong., 2d Sess. 5 (1950), but had not anticipated a rise in volume of such proportions. Shipping line representatives had testified that American commercial volume was declining, while government spokesmen pointed out that the total volume of commercial shipping had gone up sharply in the past year. Hearings before the Subcommittee on Maintenance and Operation of the Panama Canal of the Senate Committee on Armed Services, 81st Cong., 2d Sess. 16, 20, 39 (1950).

[10] 1955 Audit, 1-4, 19.

changes in wording adopted in 1951.[11] The defendant views [fol. 244] § 411 as controlling and finds great significance

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[11] "CHAPTER 23.—TOLLS FOR USE OF CANAL

"411. AUTHORITY [OF PRESIDENT] TO PRESCRIBE [AND CHANGE] MEASUREMENT RULES AND TOLLS.—The [President] *Panama Canal* Company is authorized [subject to the provisions of the section next following] to prescribe and from time to time change *(1) the rules for the measurement of vessels for the Panama Canal, and (2), subject to the provisions of the section next following,* the tolls that shall be levied [by the Government of the United States] for the use of the Panama Canal [; but no tolls when prescribed as above shall be changed unless six months' notice is given by the President by proclamation.] *: Provided, however, That the rules of measurement, and the rates of tolls, prevailing on the effective date of this amended section shall continue in effect until changed as provided in this section: Provided further, That the said corporation shall give six months' notice, by publication in the Federal Register, of any and all proposed changes in rates of tolls, during which period a public hearing shall be conducted: And provided further, That changes in basic rules of measurement and changes in rates of tolls shall be subject to, and shall take effect upon, the approval of the President of the United States, whose action in such matter shall be final and conclusive.*

"412. BASES OF TOLLS [; MAXIMUM AND MINIMUM RATES].—*(a)* Tolls on merchant vessels, army and navy transports, colliers, *tankers*, hospital ships, supply ships, and yachts shall be based on net vessel-tons of one hundred cubic feet each of actual earning capacity determined in accordance with the [Rules] *rules* for the [Measurement] *measurement* of [Vessels] *vessels* for the Panama Canal, [prescribed by the President and as may be modified by him from time to time by proclamation,] and tolls on other floating craft shall be based on displacement tonnage. [Provided, That the basic rules of measurement shall not be changed except after public hearing and six months' public notice of such change. The rate of tolls on laden

in the use of the verb "authorizes," which it contrasts with the mandatory word "shall," found in other parts of the

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vessels shall not exceed $1, nor be less than $0.75 per net vessel-ton as determined under the aforesaid rules, and] *The rate of tolls* on vessels in ballast without passengers or cargo [the rate] may be less than the rate of tolls for vessels with passengers or cargo. [In addition to the tolls based on measurement or displacement tonnage, tolls may be levied on passengers at rates not to exceed $1.50 for each passenger.]

"(b) Tolls shall be prescribed at a rate or rates calculated to cover, as nearly as practicable, all costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto, including interest and depreciation, and an appropriate share of the net costs of operation of the agency known as the Canal Zone Government. In the determination of such appropriate share, substantial weight shall be given to the ratio of the estimated gross revenues from tolls to the estimated total gross revenues of the said corporation exclusive of the cost of commodities resold, and exclusive of revenues arising from transactions within the said corporation or from transactions with the Canal Zone Government.

"(c) Vessels operated by the United States, including warships, naval tenders, colliers, tankers, transports, hospital ships, and other vessels owned or chartered by the United States for transporting troops or supplies, may in the discretion of the President of the United States be required to pay tolls. In the event, however, that such vessels are not required to pay tolls, the tolls thereon shall nevertheless be computed and the amounts thereof shall be treated as revenues of the Panama Canal Company for the purpose of prescribing the rates of tolls, and shall be offset against the obligations of the said corporation under paragraphs (c) and (e) of section 246 of this title, as amended.

"(d) The levy of tolls is subject to the provisions of section 1 of article *III of treaty between the United States of America and Great Britain concluded on*

statute.[12] The plaintiffs reply that § 411 merely identifies the person delegated with toll-fixing power and prescribes the procedure, while the obligation to set tolls according to formula flows from § 412, where the mandatory language is found.

Defendant next points to the retention in § 411 of the words "prescribe and from time to time change" which were [fol. 245] also used in the earlier version of the statute conferring discretionary power on the President. From this we are asked to infer that similar discretionary power is to be exercised by the new authority. Plaintiffs reply that the old scheme was only discretionary within statutory limits and that on occasion the President sought congressional approval even for changes within these limits.[13] They also cite the first section of Article III of the Hay-Pauncefote Treaty of November 18, 1901, restricting Pres-

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November 18, 1901, of articles XVIII and XIX of the convention between the United States of America and the Republic of Panama [entered into] *concluded on* November 18, 1903, and of article I of the treaty between the United States of America and the Republic of Colombia proclaimed on March 30, 1922.

"*(e) Capital investment for interest purposes shall not include any interest during construction.*"

[12] And see, *e.g.*, *U. S. ex rel. McLennan* v. *Wilbur*, 283 U.S. 414, 418, 420; *U. S. ex rel. Simons* v. *Hines*, D. C. Cir., 69 F. 2d 229. But see *Supervisors* v. *United States*, 71 U.S. 435, 4 Wall. 435, 445-447; *United States Sugar Equalization Board* v. *P. De Ronde & Co.*, 3 Cir., 7 F. 2d 981, 985-986, certiorari dismissed 271 U.S. 691.

[13] In 1937 confusion over the statutory definition of tonnage led President Roosevelt to appoint a committee, which recommended revision of § 412 to provide for measurement rules. Sen. Doc. No. 23, 75th Cong., 1st Sess. On August 24, 1937, the committee's recommendation was enacted by Congress, 50 Stat. 750, and the President revised tolls accordingly three days later. Presidential Proclamation No. 2248, 2 Fed. Reg. 1765-1774.

idential discretion by the requirement that all tolls be "just and equitable." [14]

The transposition of the phrase "subject to the provisions of the section next following" to modify the word "change" instead of the word "authorized," indicates to the defendant that the mandatory provisions of § 412 were applicable only when and if changes in tolls were attempted. Plaintiffs however contend that the transposition, if at all significant, meant only that toll-making was subject to § 412, while the rules for measuring vessels were not. The plaintiffs also say that another part of the statute making the legislation [fol. 246] effective as of the time when the President transferred the canal to the corporation[15] answers the defendant's claim that §§ 411 and 412 fail to specify when the formula should go into effect, thus indicating discretion to delay utilizing the new scheme.

Finally, the defendant draws us to the proviso in § 411 that "the rates of tolls, prevailing on the effective date of this amended section shall continue in effect until changed as provided in this section." But this may have been intended to continue the legal authority of the old tolls fixed by the President during the interregnum when the Presi-

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[14] "The United States adopts, as the basis of the neutralization of such ship canal, the following Rules, substantially as embodied in the Convention of Constantinople, signed the 28th October, 1888, for the free navigation of the Suez Canal, that is to say:

"1. The canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable." 32 Stat. 1903. The treaty is incorporated by reference into § 412(d), Tit. 2, of the Canal Zone Code.

[15] Act of Sept. 26, 1950, § 14, 64 Stat. 1043. The transfer occurred July 1, 1951. Exec. Order No. 10263, 16 Fed. Reg. 6333.

dent was no longer authorized to promulgate tolls and his corporate successor had not yet promulgated any, and would not be inconsistent with plaintiffs' position.

Summing up, the defendant would read the two sections as governing any future effort to change tolls, but leaving it entirely up to the defendant when and if any changes should be attempted. The plaintiffs just as cogently glean from the language a requirement that once the properties of the canal are given to the defendant the new formula must be applied with reasonable speed. Both interpretations are reasonable from the naked words, and we must seek further for their meaning.

B. Legislative History. During the three-year legislative progress of the statute there was no discussion of the possibility that the new law would work out to mean a drop in toll rates which the defendant might be reluctant to announce. The universal assumption of legislators and lobbyists was that the new § 412 would authorize an increase in some amount,[16] which the defendant would [fol. 247] announce as soon as the necessary computations were completed.[17] The shipping industry, for example, lobbied to place a $1.00 maximum on tolls, holding the rise to 10 cents a laden ton.[18] The old informal formula of the

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[16] Hearings, *supra* note 9, at 8, 15, 28; Hearings before the Subcommittee on the Panama Canal of the House Committee on Merchant Marine and Fisheries, 81st Cong., 2d Sess. 68, 141 (1950); Sen. Rep. No. 2531, 81st Cong., 2d Sess. 5 (1950); 96 Cong. Rec. 13375, 14672 (1950).

[17] The Bureau of the Budget, which presented the bill which became law, expected the computations to take one year. A Report and Recommendations of the Bureau of the Budget, H. R. Doc. No. 460, 81st Cong., 2d Sess. 16 (1950) (hereafter, Bureau of the Budget Report); Hearings, *supra* note 16, at 48.

[18] *E.g.*, Hearings, *supra* note 16, at 76-82; Hearings, *supra* note 9, at 11-17. The proposal passed the House, but was rejected by the Senate Committee. Sen. Rep. No. 2531, 81st Cong., 2d. Sess. 4 (1950).

President, the Treasury Department, and the governor had long indicated that an increase was in order;[19] and since 1948 the President had been impatient to proclaim the maximum statutory toll.[20] The major concern was that the defendant might be required by rising costs to raise tolls to the point where the intercoastal shipping industry could no longer compete with the railroads,[21] and the statutory proviso that toll increases be approved by the Presi-[fol. 248] dent was designed to safeguard the ship lines in that eventuality.[22]

The scope of the defendant's discretion must therefore be inferred from the general scheme of regulation which Congress created. The major change was the transfer of toll-making authority from the President to a government corporation organized on commercial lines. This was coupled with abandonment of the old statutory maxima and minima in favor of a single requirement that tolls cover costs. The latter were carefully delineated by Congress for the first time. These changes together spell an

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[19] The last time the old formula indicated the propriety of reducing tolls was in 1931, and the following year the formula was revised to remove the national defense write-off of some canal costs. Hearings, *supra* note 9, at 39. At the time the 1950 statute was passed, application of the old formula would have meant an increase of from 45 to 50 cents per ton. Hearings, *supra* note 9, at 7, 17, 24.

[20] On March 26, 1948, President Truman proclaimed a toll rise effective in six months. Presidential Proclamation No. 2775, 3 CFR 30 (1948 Supp.). The effective date was postponed to March 1, 1949, September 1, 1949, March 1, 1950, and finally March 1, 1951, while Congress considered the present statute; and upon passage of the present law the original announcement of an increase was revoked. Presidential Proclamation No. 2903, 3 CFR 56 (1950 Supp.), revoking Proclamations 2775, 2808, 2831, 2852, and 2875.

[21] Hearings, *supra* note 9, at 11, 14-16, 27, 36, 39; Hearings, *supra* note 16, at 67-69, 82-83, 102-125, 133-134, 142-152.

[22] Hearings, *supra* note 9, at 7; Bureau of the Budget Report at 17.

intention to change toll-making from a political decision made by the President to an economic decision made by the defendant corporation.[23]

A certain latitude was allowed the defendant in deciding how frequently to change tolls, but this was limited by the requirement that in the long run tolls must reflect costs.[24] Congress was expected to review these short-range

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[23] *E. g.*, "If there is agreement as to the formula for establishing the toll rates and adequate business-type accounts and financial reporting, there is no sound reason for not delegating the rate-making function to the Company's Board of Directors, as has been done in the case of other Government corporations, such as TVA, which set the rates to be charged for their services." Statement of Harold Seidman, Accompanied by Russell Roane, Representing the Bureau of the Budget, Hearings, *supra* note 9, at 7, and Hearings, *supra* note 16, at 46. See also Bureau of the Budget Report at 16.

Throughout the hearings and debate it was assumed that, under the new law, tolls would be set by the defendant to make the canal self-sustaining, and there was virtually no mention of the President's veto power. Hearings, *supra* note 9, at 9, 11, 18, 27, 36; Hearings, *supra* note 16, at 54, 66, 68, 133, 139; 96 Cong. Rec. 13371-13380, 14671-14672.

[24] "The present basis of establishing tolls rates does not lend itself to the ready adjustment of rates, either up or down, to reflect increases or decreases in costs or changes in commercial conditions. * * * It is significant that the tolls rates have not been changed under this formula since 1938.

"* * * *

"While the tolls rate should not be changed on a year-to-year basis since 1 year's experience is insufficient to reflect accurately long-range trends, the rate should be adjusted periodically as changes take place in the factors that determine the charges that should be made for the use of the Canal. As the 1937 special committee expressed it:

"'Economic and commercial conditions are not static. The Panama Canal is a facility for the service

[fol. 249] decisions with the aid of the defendant's annual budgets, but neither Congress nor the defendant was authorized to ignore the statutory formula indefinitely for reasons of policy or convenience.[25]

This last power was given the President, apparently to protect the American shipping industry.[26] Exercise of the Presidential veto was hardly discussed during the legislative history of the Act, and the apparent assumption of all concerned was that as a general rule the defendant's rate changes would become law. It was clear to Congress that the Hay-Pauncefote Treaty forbade discrimination against foreign vessels, so that any Presidential veto of rate increases would have to subsidize not only American lines, but the foreign lines, which comprised more than half the canal's commercial volume.[27]

That the defendant would defer toll changes in order to apply canal profits to cover its losses in other enterprises never occurred to the legislators. Although the cost formulae of the other ventures were not spelled out in the stat[fol. 250]ute, each enterprise was expected to be self-sustaining[28] and the annual commercial-style budget of

> of interoceanic commerce. The charges for the service should receive such adjustments from time to time as will keep the charges in harmony with the needs of the Canal and the requirements that must be met in making the Canal the servant and assistant of international intercourse.'" Bureau of the Budget Report at 16.

Congress recognized the possibility that in the long run the new formula might require reduction of tolls. Bureau of the Budget Report at 16; Hearings, *supra* note 9, at 18, 36; Hearings, *supra* note 16, at 139; Sen. Rep. No. 2531, 81st Cong., 2d Sess. 5 (1950).

[25] Hearings, *supra* note 16, at 49-50.

[26] Notes 21, 22 *supra*.

[27] Hearings, *supra* note 9, at 13, 23; Hearings, *supra* note 16, at 67, 146-147; 96 Cong. Rec. 13373-13379.

[28] Bureau of the Budget Report at 14; Hearings, *supra* note 9, at 8, 18-19, 22; Hearings, *supra* note 16, at 66-67, 74; Sen. Rep. No. 2531, 81st Cong., 2d Sess. 4 (1950); H. R. Rep. No. 2935, 81st Cong., 2d Sess. 3 (1950).

the defendant corporation was expected to facilitate congressional scrutiny of the various operations. Until the GAO audit the defendant's ambiguous bookkeeping concealed the fact that the Treasury was being deprived of profits made in operating the canal, so that consumers of goods and services furnished by the other ventures could enjoy them below cost—the very type of subsidy the Government Corporation Control Act and the 1951 amendments to the Panama Canal Act were designed to prevent. The men who spent three years hammering out a compromise toll formula for future operation of the canal did not mean to give the defendant's board of directors carte blanche to ignore the statutory mandate whenever the defendant's other business ventures were losing money.

We conclude that Panama Canal Company was expected to propose changes in tolls for Presidential approval whenever it became apparent that tolls were substantially out of line with costs. While it was given discretion to defer proposals of change for short periods of time where it believed the discrepancy between costs and revenue was due to a temporary factor, it could not delay such proposals unreasonably long.

II. Defendant's Asserted Discretion to Delay

Defendant contends that, even if it was required to propose changes with reasonable frequency, it has been justified in delaying action until an appraisal of the property was completed, without which depreciation and interest [fol. 251] could not be accurately estimated.[29] The appraisal has now been finished and further delay cannot be justified on that ground.[30] It further suggests that the Korean War, pending legislation to alter § 412, and the 1955 treaty with Panama have introduced "uncertainty

[29] The defendant gives at its reason for not promulgating new tolls on its estimate of the property's value: "In view of the policy that tolls should remain stable over a period of years, it is evident that Congress did not intend tolls to be determined upon so tenuous and temporary a basis." Defendant-Appellee's Brief, p. 42.

[30] *Id.* p. 43.

rendering it unwise to change tolls at the present time." It has been five years since the new formula went into effect and almost two decades since the tolls were last changed. Uncertainty has become the norm in world affairs. The legislative policy is to make tolls reflect changes in these uncertainties, and not to suspend all changes until world conditions become static;[31] further delay is not an exercise of the defendant's conceded discretion to determine the frequency of toll changes, but an arbitrary refusal to obey the mandatory requirement of § 412 that tolls be set in accord with costs.

III. Judicial Review of Administrative Non-Action

We thus reach the question of judicial review. Judge Walsh stated his conclusion that such review was not intended by Congress in several ways: failure to join the United States as an indispensable party; no standing to sue; inability to compel a government officer to exercise his discretion by writ of mandamus; and lack of finality in the defendant's action, which is subject to Presidential revision. On appeal defendant also suggests that a district court outside the District of Columbia lacks power to issue writs of mandamus, and that courts should not review the management of the public domain.

[fol. 252] There is nothing in §§ 411 and 412 expressly authorizing or expressly precluding judicial review. Unless constitutional limitations exist, our power to grant relief in the premises is a matter of congressional will; and these various doctrines only point up relevant factors in our search for the silent legislative intent. We turn first to the problem of Presidential revision.

Defendant states, and we agree, that we have no power to review government decisions which are not final, and that tolls proposed by the defendant, but not yet approved by the President, lack the requisite finality. *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.*, 333 U. S. 103; *Pan American Airways Co.* v. *C. A. B.*, 2 Cir., 121 F. 2d 810. In this suit, however, we are concerned not with proposed rate changes, but with the defendant's refusal to make such proposals—a decision which has finality and

[31] See note 24 *supra*.

which is certainly effective without any approval by the President. The defendant's refusal to start the machinery for toll changes is like a court's refusal to start the process of adjudication by granting a defendant's motion to dismiss a complaint. Such a decision is a final order, although the opposite decision, denying the motion, would not be.

From the cases of *Chicago & Southern Air Lines v. Waterman S. S. Corp., supra*, 333 U. S. 103, and *Pan American Airways Co. v. C. A. B., supra*, 2 Cir., 121 F. 2d 810, the defendant argues that, where Congress establishes an agency whose decisions require Presidential approval, all judicial examination of the agency's action or inaction is precluded. But the cases will not support so broad a proposition. Both those cases dealt with the construction of § 1006 of the Civil Aeronautics Act, 49 U. S. C. § 646, which authorizes judicial review of certain orders of the Civil Aeronautics Board; and the decision of this court and the Supreme Court was that the section did not authorize [fol. 253] review of Board orders granting or denying citizen carriers' applications for certificates of convenience and necessity to engage in overseas and foreign air transportation. Justice Jackson, writing for the Supreme Court majority, did not state the sweeping proposition now urged to us, but listed the factors which led him to conclude that § 1006 was not meant to include review of that type of agency decision: (1) Congress had expressly precluded judicial review of foreign carriers' applications to engage in foreign or overseas routes, suggesting a similar policy toward domestic carriers' applications of the identical kind; (2) air commerce, by virtue of its third dimension, novelty, and danger, poses special problems not present in the regulation of ship, truck, or train transportation; (3) aerial navigation routes and bases must be correlated with national defense plans and the conduct of foreign relations; (4) the express scheme for review of CAB decisions was to permit it where the Board performed conventional functions and to preclude it where the Board inverted the usual administrative process and acted as adviser to the President; (5) the President's role in the statutory plan was to coordinate legislative and executive powers to further the commercial, strategic, and diplomatic interests of this country in the realm of foreign affairs.

None of these considerations are present here. The defendant is a government corporation, expressly made suable on all its decisions without reservation. The subject matter being regulated—marine transportation—is familiar to the courts, as is the process of rate-making. The defendant's decisions are not complicated by factors of diplomacy or national defense, since the Hay-Pauncefote Treaty forbids use of the canal toll rate as a weapon of foreign policy. Accordingly the defendant's decisions will not involve national defense data and secret foreign intelligence, as was [fol. 254] the case under the Civil Aeronautics Act.[32] The CAB's standard of "convenience and necessity" was much more vague than the formula expressed in § 412 to which the defendant corporation is to be held; and the type of CAB decisions discussed by the Supreme Court concerned the rate of expansion of the air transport industry, rather than, as here, the price to be paid by consumers to a government monopoly for services of a type frequently supplied by a public utility.[33]

It may be significant that review was sought in the case before the Supreme Court at a much later stage than here. There "submission of the Board's decision was made to the President, who disapproved certain portions of it and advised the Board of the changes which he required. The Board complied and submitted a revised order and opinion which the President approved. Only then were they made public, and that which was made public and which is before us is only the final order and opinion containing the Presi-

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[32] *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.*, 333 U. S. 103, 111-112. Unlike the present law, the statute before the Supreme Court provided that CAB decisions "shall be submitted to the President before publication thereof." 49 U. S. C. § 601.

[33] At the time the present statute was passed the most comparable waterway was the Suez Canal, then privately-owned. The tolls policy in Suez was frequently compared with that in Panama, Hearings, *supra* note 9, at 34, 37; Hearings, *supra* note 16, at 69-70, 135, 137-138, 142; 96 Cong. Rec. 13373; and the international treaty incorporated in § 412(d) of the present statute was modeled on that governing the Suez Canal. See note 14 *supra*.

dent's amendments and bearing his approval." *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.*, *supra*, 333 U. S. 103, 110. It may well be that no judicial review would be possible once the defendant's original proposal has been altered to conform with the President's political decision [34] but that question is not now before us.

[fol. 255] Panama Canal Company claims that we cannot now ignore the question, however, since it would be irresponsible to mandamus the defendant to action which would then be beyond judicial scrutiny. Assuming that this is true, it appears that in the normal situation tolls would be set by the defendant and approved by the President without alteration; there would then be no obstacle to court review. Although, on occasion, the President may intervene and thus preclude judicial review of the new rates, the mere possibility of frustration should not deprive the district court of the power to take the first step. See *Virginian R. Co.* v. *System Federation No. 40*, 300 U. S. 515; *Wilbur* v. *U. S. ex rel. Kadrie*, 281 U. S. 206, 218.

Nor is the defendant a mere adviser to the President of the type discussed in *United States* v. *George S. Bush & Co.*, 310 U. S. 371—a decision under the Tariff Act of 1930 (46 Stat. 590). The Act authorized the Tariff Commission to recommend increases in the statutory import duties if existing duties failed to equalize production costs of foreign and domestic articles. A recommendation to increase the duty on canned clams was approved by the President with the statutory finding that "in his judgment such rates of duty are shown by such investigation of the commission to be necessary to equalize such differences in costs of production." The Court of Customs and Patent Appeals, authorized to review "a question or questions of law only," held the increase invalid because in computing the cost of Japanese production the Commission and the President converted yen into dollars at the 1932 rate of exchange, instead of the rate of earlier years before Japan went off the gold standard. The Congress had deliberately failed to specify the year on which exchange rates should be con-

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[34] *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.*, 333 U. S. 103, 112-114; but see *Shaughnessy* v. *Pedreiro*, 349 U. S. 48.

puted, and the President's method of solving the problem was held nonreviewable by the Supreme Court. "What-[fol. 256] ever may be the scope of appellate jurisdiction conferred by § 501 of the Tariff Act of 1930, it certainly does not permit judicial examination of the judgment of the President that the rates of duty recommended by the Commission are necessary to equalize the differences in the domestic and foreign costs of production." *United States* v. *George S. Bush & Co., supra*, 310 U. S. 371, 379. The Court carefully limited its language to tariff acts, where for a century the President had been given wide discretion to make such decisions; and it noted that the Tariff Commission had traditionally acted as an adviser only, either to Congress or to the President. The differences between the background, subject matter, and language of the tariff statute and the present law dispel any inference that Congress intended the same scope of review for canal users as for importers of foreign commodities.

Even assuming the scope of review under that statute and this one to be the same, we think the Supreme Court would have allowed the Court of Customs and Patent Appeals to act in the event the Tariff Commission, like the present defendant, boldly refused to hold any hearings concerning rate changes despite adequate indications that changes were necessary to comply with the statutory formula. The present case would be more comparable to the *Bush* decision if the present plaintiffs were trying to declare new tolls invalid because of the type of depreciation computation chosen by the agency and approved by the President.

Before 1950 the President was authorized to set tolls, and the epithet "adviser" could properly be applied to the governor of The Panama Canal. But if the changes in § 411 are to have any meaning the defendant is now the rate maker, and not a counselor. The legislative history similarly supports this.

[fol. 257] As a last resort the defendant presses on us cases involving administration of the public domain;[35]

[35] *E.g., United States* v. *Midwest Oil Co.*, 236 U. S. 459, 474; *Butte City Water Co.* v. *Baker*, 196 U. S. 119, 126; *Alabama* v. *Texas*, 347 U. S. 272, 273; *United States* v. *San*

but the problems presented by them are far removed from those of a government corporation, organized on a commercial model, charging consumers for the type of services ordinarily supplied by private enterprise. Moreover, the public domain cases have no factor analogous to the treaty—the Hay-Pauncefote Treaty, *supra*—which here binds the government to conduct its venture in a fashion that will provide fair and equitable tolls for users of all lands. Compare *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 128, 129, which the defendant cites.

The growing tendency of the courts and Congress has been to submit more matters once thought to concern internal government administration to examination in open court. See, *e.g.*, *Honovich* v. *Chapman*, D. C. Cir., 191 F. 2d 761 (Secretary of the Interior's regulations concerning Indians' wills); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123 (Attorney-General's listing of organizations for use in screening government personnel); *Shachtman* v. *Dulles*, D. C. Cir., 225 F. 2d 938 (passport denial); *Textile Workers Union of America* v. *Allendale Co.*, D. C. Cir., 226 F. 2d 765 (Walsh-Healey Act determinations reviewable under the Fulbright Amendment, 66 Stat. 308, 41 U. S. C. § 43a, which overruled *Perkins* v. *Lukens Steel Co.*, *supra*, 310 U. S. 113); Administrative Procedure Act, 5 U. S. C. § 1009(c), "every final agency action for which there is no other adequate remedy in any [fol. 258] court shall be subject to judicial review." We think the intent of Congress was to allow judicial review in these circumstances.

Nor is there any lack of standing to sue. Section 10(a) of the Administrative Procedure Act, 5 U. S. C. § 1009(a), confers standing on persons "suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute," and the plaintiffs can point to the Panama Canal Act of 1912, as amended in 1951, as well as the Hay-Pauncefote,

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Francisco, 310 U. S. 16, 29-30; *Light* v. *United States*, 220 U. S. 523, 537. *Cf.* Section 4 of the Administrative Procedure Act exempting from some rule-making requirements "any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." 60 Stat. 238, 5 U. S. C. § 1003.

Treaty, as their statutory authority. Moreover, without legislation they have a right to judicial redress, since the corporation's action in charging tolls in excess of the statutory rate was "of a sort that, if taken by a private person, would create a right of action cognizable by the courts."[36] *Joint Anti-Fascist Refugee Committee* v. *McGrath*, *supra*, 341 U. S. 123, 152 (concurring opinion of Justice Frankfurter).

Here there is no controversy over the proper person to sue; all users of the canal have been joined in a single class action. The question is rather whether or not there is to be judicial review, since a finding of no standing here means that the courts have no power in the premises. See *Joint Anti-Fascist Refugee Committee* v. *McGrath*, *supra*, 341 U. S. 123, 186 (concurring opinion of Justice Jackson). From all that has gone before we conclude that court relief was not precluded and that the plaintiffs may seek it.

A final argument is made that legislative and executive supervision is sufficient and that judicial interference will prove cumbersome. The President's power to remove mem- [fol. 259] bers of the defendant's board of directors and his veto power are stressed in this connection, as well as the supervisory power wielded by Congress through annual appropriation bills. But identical balances and checks rein most government agencies, whose decisions are nevertheless subject to judicial scrutiny. For the person unable to get redress from the busy legislature or White House the courts remain open.

IV. The United States as Indispensable Party

The holding that the United States was an indispensable party applies, as we understand the opinion below, only in so far as the plaintiffs seek to recover money from the defendant, and not to the request for injunctive or man-

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[36] The right of a consumer to sue a utility which charges excessive tolls is established, *e.g.*, *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 436; *United States* v. *Public Utilities Commission of District of Columbia*, D. C. Cir., 151 F. 2d 609; *Richman* v. *Consolidated Gas Co. of New York*, 114 App. Div. 216, 100 N. Y. S. 81, affirmed 186 N. Y. 209, 78 N. E. 871.

damus relief. We do not pass on the necessity for joining the United States as defendant, since we think a money recovery is precluded by other considerations. Restitution of overcharges would require determination of the tolls that should have been set. Although the district court might reconstruct the tolls which the defendant corporation should have promulgated, there is no way of knowing whether or not the President would have approved them. Moreover, there is no statutory authority for utilizing the defendant's facilities for measuring the amount of money to be awarded the plaintiffs in suits to recover overcharges. See *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246, 253-255. We find no evidence of a congressional intent to allow recovery of overcharges.

V. Availability of the Remedy of Mandatory Injunction

Panama Canal Company's last argument rests on the doctrine that federal courts outside the District of Columbia lack statutory authority to issue writs of mandamus against government officers in the exercise of their original [fol. 260] jurisdiction. *McIntire* v. *Wood*, 11 U. S. 504, 7 Cranch 504; *Rosenbaum* v. *Bauer*, 120 U. S. 450; *Knapp* v. *Lake Shore & M. S. R. Co.*, 197 U. S. 536; *Covington & C. Bridge Co.* v. *Hager*, 203 U. S. 109. The lower federal courts have not been consistent in handling efforts to avoid this doctrine by actions for mandatory injunctions or declaratory judgment;[37] but we need not review those cases, since the *McIntire* line of cases is inapplicable to an action like the present one against a corporation. *Virginian R. Co.* v. *System Federation No. 40*, *supra*, 300 U. S. 515, affirming 4 Cir., 84 F. 2d 641, 646. The present situation is even more favorable for issuing a mandatory injunction, since by congressional legislation the defendant was made suable in New York, rather than in the District of Columbia.

We conclude that the judgment of dismissal for the defendant should be reversed and summary judgment should be entered for the plaintiffs on their motion therefor to the extent set forth in, and in accordance with, this opinion.

Reversed and remanded for judgment for the plaintiffs.

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[37] See Note, 38 Col. L. Rev. 903 (1938).

[fol. 261] In United States Court of Appeals for the Second Circuit

Grace Line, Inc., et al., Plaintiffs-Appellants

v.

Panama Canal Company

Judgment—April 8, 1957

Appeal from the United States District Court for the Southern District of New York.

This cause came to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and action remanded for judgment for plaintiffs in accordance with the opinion of this Court; with costs to the appellant.

A. Daniel Fusaro, Clerk.

[fol. 261a] [File endorsement omitted.]

[fol. 262] In United States Court of Appeals, Second Circuit

[Title omitted]

Order Denying Stay of Mandate—April 25, 1957

A motion having been made herein by counsel for the appellee to stay the issuance of the mandate pursuant to Rule 28(c) of the Rules of this court pending application to the Supreme Court of the United States for a writ of certiorari,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied.

A. Daniel Fusaro, Clerk.

[fol. 262a] [File endorsement omitted.]

[fol. 263] IN THE UNITED STATES COURT OF APPEALS

OPINION DENYING STAY OF MANDATE—April 30, 1951

Motion denied. In view of the heavy accumulating loss to plaintiff by defendant's failure to perform what this court holds to be its legal obligation and of the ease with which it can seek interim relief from the Supreme Court or a justice thereof if we are in error, a stay of the mandate to prevent even a beginning in the lengthy steps necessary towards compliance with the court's order is not in the interest of justice.

(S.) Charles E. Clark, (S.) Carroll C. Hincks, U.S.C.J.J.

April 30, 1957

[fol. 264] IN UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

[Title omitted]

ORDER DENYING STAY OF MANDATE—May 1, 1957

A motion having been made herein by counsel for the appellee to stay the issuance of the mandate pending application to one of the Justices of the Supreme Court of the United States for a stay of the issuance of the mandate for a writ of certiorari,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied.

A. Daniel Fusaro, Clerk.

[fol. 265] [File endorsement omitted]

[fol. 266] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1956

PANAMA CANAL CO.

v.

GRACE LINE, INC., et al.

MEMORANDUM OPINION—May 7, 1957

On Application for Stay Pending Petition for Certiorari

Mr. Justice Harlan, Associate Justice

This is an application by the Panama Canal Company, a government instrumentality, for a stay of the mandate of the Court of Appeals, pending determination by the Solicitor General as to whether certiorari should be sought to review the decision below and pending further proceedings in this Court, if certiorari is applied for. The Assistant Attorney-General in charge of the case has advised me that he has recommended to the Solicitor General that a petition for certiorari be filed.

The controversy relates to the duties of the petitioner, Panama Canal Company, under the Act of September 26, 1950, 64 Stat. 1038, with respect to establishing tolls for the use of the Canal. The District Court dismissed the complaint, considering that the court had no jurisdiction of the subject matter of the suit, and that the respondent steamship companies had no standing to sue. The Court of Appeals reversed as to the jurisdictional question, and as to the merits, granted summary judgment in favor of the steamship companies. The effect of that decision, as both sides seem to agree, is (a) to require the Panama Canal Company to proceed with a revision of the Canal tolls, in accordance with the Court of Appeals' construction of the 1950 Act, and the accounting views of the General Accounting Office, whose correctness is disputed by the Panama Canal Company; and (b) to deny the steamship companies recovery for excessive past rates, if the [fol. 267] revised tolls should turn out to be lower. The Court of Appeals (Chief Judge Clark and Judge Hincks)

denied petitioner's application for a stay pending review by this Court.*

After hearing the parties and considering their memoranda, I am of the opinion that a stay should issue. Without intimating any views as to the merits, I think the character of the questions involved is such that it cannot be said that it is unlikely that certiorari will be granted. While I recognize the force of the steamship companies' argument that if the decision of the Court of Appeals ultimately stands, the companies will have no recourse for alleged excessive tolls paid by them during the period of a stay, the weight of this argument is diminished by the conceded fact that the companies' present rates to shippers naturally take into account the present Canal tolls. I regard the steamship companies' contention as being outweighed by the undesirability of requiring the Panama Canal Company to go forward with revamping its entire toll structure, until its duty to do so, and the principles on which it should proceed, are finally adjudicated in this litigation. Apart from all else, the fixing of such tolls is not alone a commercial undertaking, but also one that involves this country's relations with the foreign governments whose nationals are users of the Canal.

I am constrained to accept the Government's representations that the uncertainties and confusion which [fol. 268] might ensue from requiring the Panama Canal Company to proceed before this litigation is over might embarrass our relations with such foreign governments. And because of the peculiar position occupied by the Panama Canal Company as a political instrumentality, it seems to me that it should not be required to go forward under the Court of Appeals' decision until the issues in

*"The memorandum of the Court of Appeals is as follows: "Motion denied. In view of the heavy accumulating loss to plaintiff by defendant's failure to perform what this court holds to be its legal obligation and of the ease with which it can seek interim relief from the Supreme Court, or a Justice thereof if we are in error, a stay of the mandate to prevent even a beginning in the lengthy steps necessary towards compliance with the court's order is not in the interest of justice."

this controversy are settled. I think the particular interim interests of these steamship companies must yield to the broader concerns involved in having this litigation proceed to an orderly final conclusion.

I am informed by respondents that they have ascertained that the mandate of the Court of Appeals has gone to the District Court. I shall therefore stay all further proceedings under that mandate pending the filing and determination of the petitioner's petition for certiorari in this Court, upon condition, however, that the petition for certiorari is filed within the time prescribed by law. 28 U. S. C. § 2101 (c).

May 7, 1957.

[fol. 269] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1956

No. —

[Title omitted]

ORDER STAYING MANDATE—May 7, 1957

Upon consideration of the application of counsel for the petitioner, the opposition of the respondents, and after hearing oral argument,

It is ordered that all further proceedings under the mandate of the United States Court of Appeals for the Second Circuit be stayed, pending the timely filing and determination of petitioner's petition for a writ of certiorari.

(Sgd.) John M. Harlan, Associate Justice of the Supreme Court of the United States.

Dated this 7th day of May, 1957.

[fol. 270] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1956

PANAMA CANAL CO.

v.

GRACE LINE, INC., et al.

SUPPLEMENTAL MEMORANDUM—May 16, 1957

On Application for Stay Pending Petition for Certiorari

Mr. Justice Harlan, Associate Justice

In view of the representations made in the letter of May 10, 1957, from counsel for the respondents to the Clerk, I shall amend the third and fourth sentences in the first full paragraph on page 2 of my Memorandum of May 7, 1957, to read as follows:

"While I recognize the force of the steamship companies' argument that if the decision of the Court of Appeals ultimately stands, the companies will have no recourse for alleged excessive tolls paid by them during the period of a stay, I regard the strength of this contention as being outweighed by the undesirability of requiring the Panama Canal Company to go forward with revamping its entire toll structure, until its duty to do so, and the principles on which it should proceed, are finally adjudicated in this litigation."

May 16, 1957.

[fol. 271] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1957

Nos. 251 and 252

PANAMA CANAL COMPANY, Petitioners,

vs.

GRACE LINE, INC., et al.; and

GRACE LINE, INC., ISBRANDTSEN COMPANY, INC., LUCKENBACH STEAMSHIP COMPANY, INC., et al., Petitioners,

vs.

PANAMA CANAL COMPANY

ORDER ALLOWING CERTIORARI—Filed October 14, 1957

The petitions herein for writs of certiorari to the United States Court of Appeals for the Second Circuit are granted. The cases are consolidated and a total of two hours allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1956

PANAMA CANAL COMPANY, PETITIONER

v.

GRACE LINE, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. —

PANAMA CANAL COMPANY, PETITIONER

v.

GRACE LINE, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Panama Canal Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above cause on April 8, 1957.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York, dated June 28, 1956 (Pl. App. 165a-187a),[1] is reported at 143 F. Supp. 539. The opinion of the United States Court of Appeals for the Second Circuit, dated April 8, 1957[2] (Appendix *infra*, pp. 42-67), has not yet been reported.

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[1] "Pl. App." refers to the Appendix to the plaintiffs-appellants' (respondents') brief filed in the Court of Appeals. "Def. App." refers to the Appendix to defendant-appellee's (petitioner's) brief filed in that court.

[2] By Chief Judge Clark, for himself and Circuit Judge Hincks. Judge Frank's death occurred after the argument of the case.

JURISDICTION

The judgment of the Court of Appeals was entered on April 8, 1957 (Appendix, *infra*, pp. 67-68). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether American shipowners and operators may by mandamus compel petitioner, a Government agency, to prescribe new and lower Panama Canal tolls when that determination involves questions of discretion and business judgment in respect of an internal fiscal matter of the Government, and requires the approval of the President.

2. Whether Sections 105 and 106 of the Government Corporation Control Act impose upon a Government corporation the ministerial duty to comply with the conclusions regarding accounting, cost allocation, and statutory interpretation reached by the Comptroller General in his commercial-type audit report.[3]

STATUTES INVOLVED

1. Canal Zone Code, Title 2, Sections 411 and 412, as amended by the Act of September 26, 1950, 64 Stat. 1038, provide in pertinent part:

> 411. AUTHORITY TO PRESCRIBE MEASUREMENT RULES AND TOLLS.—The Panama Canal Company

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[3] If the writ of certiorari is granted, we shall also raise the following questions briefly touched upon in this petition:

1. Whether the district courts outside the District of Columbia have jurisdiction to grant mandatory relief.

2. Whether, considering that only petitioner's motion to dismiss the complaint for lack of jurisdiction was *sub judice*, the Court of Appeals erred in granting respondents' motion for summary judgment, to which petitioner has not filed any answering affidavits.

is authorized to prescribe and from time to time change (1) the rules for the measurement of vessels for the Panama Canal, and (2), subject to the provisions of the section next following, the tolls that shall be levied for the use of the Panama Canal: *Provided, however,* That the rules of measurement, and the rates of tolls, prevailing on the effective date of this amended section shall continue in effect until changed as provided in this section: *Provided further,* That the said corporation shall give six months' notice, by publication in the Federal Register, of any and all proposed changes in basic rules of measurement and of any and all proposed changes in rates of tolls, during which period a public hearing shall be conducted: *And provided further,* That changes in basic rules of measurement and changes in rates of tolls shall be subject to, and shall take effect upon, the approval of the President of the United States, whose action in such matter shall be final and conclusive.

412. * * *

(b) Tolls shall be prescribed at a rate or rates calculated to cover, as nearly as practicable, all costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto, including interest and depreciation, and an appropriate share of the net costs of operation of the agency known as the Canal Zone Government. In the determination of such appropriate share, substantial weight shall be given to the ratio of the estimated gross reve-

nues from tolls to the estimated total gross revenues of the said corporation exclusive of the cost of commodities resold, and exclusive of revenues arising from transactions within the said corporation or from transactions with the Canal Zone Government.

2. Section 10 of the Administrative Procedure Act and the Acts of June 29, 1948, 62 Stat. 1075, and September 26, 1950, 64 Stat. 1038, are set forth in Def. App., pp. 4a-23a.

STATEMENT

These proceedings, brought by a large number of American shipping companies using the Panama Canal (Pl. App. 2a, 3a), are designed to compel petitioner, the Panama Canal Company, (a) to prescribe new tolls for the use of the canal, (b) to base its computations upon accounts no less favorable to respondents than those used by the General Accounting Office, and (c) to refund tolls allegedly illegally collected in the past, claimed to amount to more than $27,000,000.00 (Pl. App. 7a-9a).

Respondents base their complaint upon certain statements in the Comptroller General's audit report for 1954 [4] of the Panama Canal Company [5] which are crit-

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[4] H. Doc. 160, 84th Cong., 1st Sess. For pertinent parts of this report see Def. App. 30a-43a.

[5] Inasmuch as petitioner is a wholly owned government corporation (*infra*, p. 6, fn. 10, 7), its financial transactions are subject to an annual business-type audit by the General Accounting Office. The Comptroller General submits a report of this audit to Congress. Government Corporation Control Act, Sections 105, 106, 59 Stat. 599, 31 U.S.C. 850, 851.

ical of some of petitioner's accounting practices.[6] The broad question presented by this litigation is whether the ultimate responsibility for the rate of Panama Canal tolls lies with petitioner and the President, as provided for in the Canal Zone Code,[7] or with the Comptroller General—particularly whether, in the event of a disagreement between petitioner and the Comptroller General, the courts, at the suit of financially interested corporations may step into this intra-governmental dispute and direct petitioner to conduct its affairs in accord with the Comptroller General's theories. We believe that a fairly detailed account of the statutes governing petitioner's corporate status and those determining the tolls of the Panama Canal will assist in the exposition of the specific questions in the case.

1. The Background of This Litigation

a. *The corporate organization of the Panama Canal Company*

Petitioner was created in 1950[8] by the transfer of the assets of the Panama Canal and of the functions of operating and maintaining it to the Panama Railroad Company and by the change of the latter's name to Panama Canal Company. Prior to 1950, the Panama

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[6] Par. 10 of the Complaint alleges that the accounts determinations are final and conclusive on petitioner, but not on respondents (Pl. App. 4a). Par. 3 of respondents' motion for summary judgment states that it is based on the Comptroller General's audit report of petitioner's affairs for the fiscal year ended June 30, 1954 (Pl. App. 16a). Similarly, the grant of summary judgment by the Court of Appeals is comprehensible only on the theory that it considered the factual issues irrefutably determined by the Comptroller General's report (see *infra*, pp. 31-32, 37).

[7] Title 2, Section 411, *supra*, pp. 2-3.

[8] Act of September 26, 1950, 64 Stat. 1038 (Def. App. 14a-23a).

Canal was maintained and operated by the President through the Governor of the Canal Zone.[9] Certain business operations supporting the maintenance and operation of the Canal, however, were conducted by the Canal's adjunct, the Panama Railroad Company.[10] These supporting business operations included the railroad across the Isthmus of Panama, a steamship line operating between the port of New York and the canal, docks, harbor terminals and coaling plants for ships on the Isthmus, commissary stores supplying employers and ships, dry and cold storage plants for supplies, two

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[9] Act of August 24, 1912, Section 3, 37 Stat. 561.

[10] The Panama Railroad Company was incorporated in 1849 under the laws of New York. Its entire capital stock was acquired by the United States during the construction of the Panama Canal. In 1945, it was designated a wholly owned Government corporation. Section 101 of the Government Corporation Control Act, 59 Stat. 597, 31 U.S.C. (1946 Ed.) 846. In view of Section 304(b) of the Government Corporation Control Act (59 Stat. 602, 31 U.S.C. 869), providing that no wholly owned Government corporation shall operate after June 30, 1948, as an agency or instrumentality of the United States unless incorporated by act of Congress, the Act of June 29, 1948, 62 Stat. 1075 (Def. App. 5a-13a) conferred a federal charter on the Panama Railroad Company as "an agency and instrumentality of the United States, and as an adjunct of the Panama Canal," "[f]or the purpose of conducting business operations incident to the care, maintenance, sanitation, operation, improvement, government, and protection of the Panama Canal." Canal Zone Code, Title 2, Section 245 (Def. App. 6a).

The statement in the opinion of the Court of Appeals (*infra*, p. 45) that the Act of June 29, 1948, was passed in order to subject the original Panama Railroad Company to the controls provided in the Government Corporation Control Act is not wholly correct. As we have shown, the Government Corporation Control Act covered the Panama Railroad Company from the day of its enactment in 1945 and the purpose of the 1948 Act, as expressed in its first section (Def. App. 5a), was to comply with the requirement of Section 304(b) of the Government Corporation Control Act that all wholly owned Government corporations should be incorporated under federal law.

hotels, and the telephone system of the Canal Zone. Congressional committees found that these business operations were "essential to the operation of the Canal, and the maintenance of employees required in the conduct of the Canal enterprise."[11]

By statute, petitioner is "an agency and instrumentality of the United States" created "for the purposes of maintaining and operating the Panama Canal and of conducting business operations incident to such maintenance and operation and incident to the civil government of the Canal Zone"; [12] it is a wholly owned Government corporation within the meaning of Section 101 of the Government Corporation Control Act.[13] Its stock is held by the President of the United States, or his designee called the "stockholder" (Canal Zone Code, Title 2, Section 246 (a)),[14] who appoints the directors of the Company to hold office at his pleasure.[15] The corporation has capacity to sue and be sued.[16]

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[11] H. Rept. No. 2396, 80th Cong., 2d Sess., pp. 1-2; S. Rept. No. 1401, 80th Cong., 2d Sess., pp. 1-2.

[12] Canal Zone Code, Title 2, Section 245, as amended, 64 Stat. 1041 (Def. App. 19a). Petitioner's corporate status is based on the Act of June 29, 1948, incorporating the Panama Railroad Company under federal law (*supra*, p. 6, fn. 10; Def. App. 5a-13a) and the Act of September 26, 1950 (Def. App. 14a-23a). Both Acts amend Title 2 of the Canal Zone Code.

[13] 59 Stat. 597, as amended by the Act of September 26, 1950, Section 2a(2), 64 Stat. 1038, 31 U.S.C. 846.

[14] Def. App. 6a-7a. At present, the Secretary of the Army is the designated stockholder. H. Doc. 160, 84th Cong., 1st Sess., p. 4 (Def. App. 35a).

[15] Canal Zone Code, Title 2, Section 247 (Def. App. 8a-9a).

[16] Canal Zone Code, Title 2, Section 248(d) (Def. App. 9a). Other portions of Sections 248 and 249 (Def. App. 9a-11a), however, reserve important incidents of sovereignty to the Panama Canal Company.

b. *The authority to prescribe tolls for the Panama Canal*

Prior to 1950, the President of the United States was authorized "to prescribe and from time to time change" the canal tolls upon six months' notice.[17] The original basic toll rate prescribed in 1912 was $1.20 per net vessel ton of 100 cubic feet of actual earning capacity.[18]

This 1912 toll rate continued in effect until 1937, a period of 25 years, when the President reduced the rate to 90¢ per net vessel ton.[19] The 90¢ toll rate, which has been continued until the present time, is that which respondents now contend to be excessive. This reduction in tolls, during the 45 years since the Canal was opened in 1912, has come about in spite of the very material increases in the value of vessels and cargoes transiting the Canal, in freight and passenger rates of such vessels, and in the operating costs of the Canal. Our traditional Panama toll policy has been, as in the case of the Suez Canal, one of maintaining reasonably constant, if not permanent, rates.

Since the repeal in 1914[20] of the discriminatory legislation fostered by our shipping interests in favor of American coastwise commerce, tolls have been uniform and nondiscriminatory. No foreign government has ever claimed the tolls were inequitable, unjust, or ex-

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[17] Act of August 24, 1912, Section 5, 37 Stat. 562.

[18] 100 Cong. Rec. (Daily Ed.) A.1996 (Def. App. 27a-28a).

[19] This change was accompanied by the abolition of an alternative method of measurement more favorable to the shipowners. 100 Cong. Rec. (Daily Ed.) A.1996 (Def. App. 28a-29a); *Encyclopedia Britannica*, Vol. 17, pp. 173-174, Panama Canal Administration and Finance.

[20] Act of June 15, 1914, 38 Stat. 385.

cessive. There has been substantial congressional criticism that the tolls were inadequate,[21] but no member of Congress has ever claimed that the tolls were excessive.

Although President Truman prescribed in 1948 an increase in the toll rate to the then statutory maximum of $1.00 per net vessel ton, at the request of Congress —prompted by the protests of the shipping industry[22] —the President postponed, and finally cancelled, this rate increase and submitted a report and recommendation of the Bureau of the Budget with respect to the organization and operation of the Panama Canal and Panama Railroad Company. This report (H. Doc. 460, 81st Cong., 2d Sess.) furnished the basis of the Act of September 26, 1950 (*supra*, p. 5, fn. 8).[23]

The 1950 statute was based on the expectation that an increase in the canal tolls might be avoided, at least in part, if the Panama Canal were operated by a business-type management and if the Panama Railroad Company, which in the past had made a profit,[24] could be made to contribute to the cost of the civil government of the Canal Zone from which it had hitherto been exempted.[25] Congress also noted that, in the process of determining canal tolls, the President did not have any opportunity to consult with any qualified rate-making authority (H. Rept. 1304, 81st Cong., 1st Sess., p. 4).

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[21] Between 1912 and 1949, the Government claimed it had sustained an accumulated deficit of $99,000,000 from the operation of the Panama Canal and its affiliated commercial operations.

[22] *Infra*, p. 45; see also H. Rep. No. 1304, 81st Cong., 1st Sess., p. 4.

[23] 100 Cong. Rec. (Daily Ed.) A.1996 (Def. App. 29a-30a).

[24] Sen. Doc. 227, 78th Cong., 2d Sess., p. 20; H. Doc. 460, 81st Cong., 2d Sess., p. 6.

[25] H. Doc. 460, 81st Cong., 2d Sess., p. 8.

In order to carry out those objectives Congress not only merged the function of operating and maintaining the canal with those of the Panama Railroad Company, but also amended Sections 411 and 412 of Title 2 of the Canal Zone Code dealing with the methods of prescribing tolls and the toll formula. The new Section 411 (*supra*, pp. 2-3) authorizes the petitioner "to prescribe, and from time to time change", the tolls for the use of the Panama Canal. If the petitioner proposes a change, it shall give six months' notice by publication in the Federal Register. Public hearings are to be conducted during this interval. Any change in the tolls, however, "shall be subject to, and shall take effect upon, the approval of the President of the United States, whose action in such matter shall be final and conclusive." Section 411 also provides that the tolls prevailing at the time of its enactment shall remain in effect until changed pursuant to the procedures set forth in that section.

Section 412(b), *supra*, pp. 3-4, contains the formula pursuant to which the petitioner shall compute the tolls. It provides that the tolls shall be calculated to cover *as nearly as practicable* all costs of maintaining and operating the canal *together with the related facilities and appurtenances* including interest and depreciation, and an *appropriate share* of the cost of the Canal Zone Government. The statute further directs that in the computation of this "appropriate share" substantial weight is to be given

> * * * to the ratio of the estimated gross revenues from tolls to the estimated total gross revenues of the said corporation exclusive of the cost of commodities resold, and exclusive of revenues arising

from transactions within the said corporation or from transactions with the Canal Zone Government.

When Congress enacted this legislation reorganizing the corporate and administrative set-up of the Panama Canal, Congress believed that, while it would not prevent completely an increase in the tolls, it would, at least, limit the extent thereof. It was generally expected that under the new formula the tolls would rise from 90¢ to 95¢ or even $1.00 per net vessel ton.[26] In fact, in the summer of 1953, Congress directed the Panama Canal Company to complete its current study regarding the *adequacy* of the canal tolls.[27] In its reply to this directive, the Company set forth its methods of determining whether or not new tolls should be prescribed. It explained that it was observing and evaluating continuously whether the current rates were proper and should be maintained or whether an adjustment was required, and that new tolls would be proposed whenever the Company should conclude that changes in rates were indicated and necessary.[28]

c. The dispute between the Comptroller General and the Panama Canal Company

The Comptroller General's reports on the Panama

[26] Sen. Rept. 2531, 81st Cong., 2d Sess., p. 5; 96 Cong. Rec. 13375. See also H. Doc. 160, 84th Cong., 1st Sess., p. 2 (Def. App. 32a-33a), and see the further detailed references in the opinion of the district court (Pl. App. 172a-173a, fn. 16-17).

[27] See Statement of the Managers on the Part of the House, accompanying the Conference Report on the Civil Functions Appropriations Bill, 1954, H. Rept. 889, 83rd Cong., 1st Sess., p. 10.

[28] 100 Cong. Rec. (Daily Ed.) A.1995 (Def. App. 24a-27a).

Canal Company [29] for the years of 1954 [30] and 1955 [31] expressed the view that the Panama Canal Company had allocated to the canal operations too high a share of the cost of the Canal Zone Government, corporate overhead, and interest payments, and an inadequate one to the supporting activities, most of which formerly had been administered by the Panama Railroad Company. According to the Comptroller General's method of cost allocation, the canal operations showed a large surplus, the supporting activities a commensurate deficit.[32] The Comptroller General also claimed that the prices charged by the supporting activities were inadequate because petitioner failed to include among the recoverable cost elements an appropriate share in the cost of the Canal Zone Government.

Having determined that by his method of cost allocation the canal operations resulted in a large surplus and those of the supporting operations in a considerable loss, the Comptroller General was of the view that under his interpretation of Section 412(b) the canal

[29] As noted above, pursuant to Section 105 of the Government Corporation Control Act (59 Stat. 599, 31 U.S.C. 850) the financial transaction of all wholly owned Government corporations are subject to an annual audit by the General Accounting Office in "accordance with the principles and procedures applicable to commercial corporate transactions". Under Section 106 of that Act (59 Stat. 599, 31 U.S.C. 851) the Comptroller General shall report on this audit to Congress with "such comments and information as may be deemed necessary to keep Congress informed of the operations and financial condition of the several corporations, together with such recommendations with respect thereto as the Comptroller General may deem advisable * * *".

[30] H. Doc. 160, 84th Cong., 1st Sess. Relevant parts of this report may be found at Def. App. 30a-43a.

[31] H. Doc. 465, 84th Cong., 2d Sess. Relevant parts of this report may be found at Def. App. 44a-56a.

[32] The Comptroller General's theories concerning the proper allocation of expenses to the petitioner's several activities, of course, did not affect petitioner's over-all profit or loss.

tolls had to be computed exclusively on the basis of the cost of operating the canal without reference to the losses incident to its supporting operations—and thus would have to be lowered considerably. He agreed, however, that this result was financially and economically unsound because the losses of the supporting activities, which he conceded to be essential to the operation of the canal and to the maintenance of its personnel, were largely attributable to fringe benefits to the canal employees and to its users, and thus actually constituted a legitimate element of the canal's cost of operations.[33] The Comptroller General also realized that under his reading of the statute this deficit of the supporting activities could not be met out of canal tolls, and funds would have to be appropriated by Congress to cover it. This meant, of course, that the canal users, more than half of which are of foreign registry, would receive a substantial subsidy at the expense of the American taxpayers. He, therefore, recommended legislation amending Section 412(b) to provide specifically that any losses of the supporting activities should be included in the cost basis for the determination of the canal tolls.

Petitioner has taken vigorous issue with the audits and reports of the Comptroller General.[34] It considers

[33] H. Doc. 160, 84th Cong., 1st Sess., pp. 8-9, 14, 16, (Def. App. 36a, 40a).

[34] Inasmuch as the Court of Appeals decided the merits of the case before the issue was joined (see *infra*, pp. 16-18), the position taken by the petitioner on this score has not been incorporated in the formal record. Petitioner's interpretation of the accounting and statutory problems, however, is a matter of public knowledge. See, *e.g.*, *Operations of the Panama Canal Company*, Hearings before Subcommittee No. 3, Panama Canal, Committee on Merchant Marine and Fisheries, House of Representatives, 83rd Cong., 2d Sess., pp. 8-10; *Panama Canal (Changes in Administration)*, Hearings before the Subcommittee of the Committee on

his cost allocation methods and conclusions to be in conflict with sound business and accounting practices and without any legal foundation.[35] Petitioner objects particularly to the Comptroller General's view that the statute requires the computation of toll rates without regard to any deficit in the operation of the supporting business activities. In contrast to the Comptroller General, who realized that his reading of the statute resulted in an economic absurdity and therefore recommended that Section 412(b) be amended, petitioner takes the position that this unreasonable result (which follows from the Comptroller's reading of the statute) cannot possibly represent the true congressional purpose and thus that no correction of the toll formula is needed.[36]

Interstate and Foreign Commerce, United States Senate, 84th Cong., 2d Sess., on S. 2167, pp. 68-70. See also the letter dated June 1, 1955, from the President of the Panama Canal Company to the Comptroller General commenting on the Audit Report for 1954, Appendix, *infra*, pp. 68-75.

[35] Petitioner's position, briefly, is that the statute does not require the allocation of corporation overhead and interest to the supporting business activities, and that the statutory phrase of Section 412(b) that in the allocation of the cost of the Canal Zone Government "substantial weight shall be given to the ratio * * *" (*supra*, p. 10) does not require the use of a strictly mathematical ratio but that consideration has to be given to business and economic realities. These facts, among others, are that any substantial increase in the charges of the supporting activities will either price them out of the market (and thus create actual, as distinguished from accounting, deficits under the economic laws of diminishing returns) (*infra*, p. 73) or require the payment of higher cost of living allowances to canal employees and thereby directly increase the cost of operating the canal.

[36] Petitioner considers the maintenance and operation of the Panama Canal as its primary and sole operational mission under its charter. In its opinion, the supporting business activities are maintained only in order to contribute to the performance of that mission. Accordingly, any deficit incurred by the supporting activities constitutes a cost element in the canal operations which is

On the basis of its own methods of cost allocation, its own business judgment, and its own interpretation of the statute, petitioner concludes that the tolls currently charged comply with the statutory toll formula and that toll changes are neither "indicated" nor "necessary".[37] This conclusion is also supported by uncertainties with respect to a number of items. Interest and depreciation cannot even be determined prior to the completion of the valuation of petitioner's assets;[38] apart from this, some elements in the cost of operations, such as the annuity payable to Panama and the wages payable to employees, are bound to rise (Pl. App. 155a-161a).[39]

The Comptroller General's Report for 1954 was transmitted to Congress on May 16, 1955.[40] Since then, Congress has approved the Department of Commerce and Related Agencies Appropriation Acts for 1956, 1957, and 1958, which include the budgets of the Panama Canal Company for those years based upon petitioner's interpretation of the statute and its methods of accounting and cost allocation.[41] On the other hand, Congress has not enacted S. 2167, 84th Cong., 2d Sess.,

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recoverable under the toll formula of Section 412(b). Cf. the documents referred to in fn. 34, *supra*, and *infra*, p. 71.

[37] Cf. 100 Cong. Rec. (Daily Ed.) A.1995 (Def. App. 24a, 25a).

[38] The statement of the Court of Appeals that this valuation has been completed (*infra*, p. 57) is based upon a misunderstanding. While the Panama Canal Company has completed the appraisal, the approval by the Bureau of the Budget, required by Canal Zone Code, Title 2, Section 246(b) (Def. App. 7a-8a), has not yet been obtained.

[39] The Comptroller General's Report for 1954 fully recognized these uncertainties. It concedes that its own figures were only tentative (Def. App. 32a), and that the Panamanian Treaty and the expected increased benefits to employees will create additional financial burdens and uncertainties (Def. App. 41a-42a).

[40] Def. App. 30a.

[41] 69 Stat. 235-237, 70 Stat. 322-324, 71 Stat. 78.

a bill containing the amendments to Section 412(b) proposed by the Comptroller General.[42]

2. The Proceedings in the District Court

On September 13, 1955, *i.e.*, within four months after the Comptroller General's Report for 1954 had been submitted to Congress, respondents filed their complaint, alleging in substance that the canal tolls were excessive, as evidenced by the Comptroller General's report, and praying for judgment requiring petitioner (a) to prescribe new tolls on the basis of the accounts proposed by the General Accounting Office, and (b) to refund the allegedly excessive tolls collected in the past. Six weeks later, before petitioner's 60 day time to answer had expired, respondents moved for summary judgment. The motion, based on Section 412(b) and the Comptroller General's Report for 1954 (Pl. App. 16a), is a heavy printed tome of nearly 60 pages of affidavits and of over 500 pages of congressional and administrative documents, hearings and reports.[43] In

[42] This failure may well have been prompted by petitioner's argument that no amendment was necessary because a deficit in the supporting business activities constituted an element in the cost of operating the canal and thus had to be considered under the existing cost formula of Section 412(b). *Panama Canal (Changes in Administration)*, Hearings before the Subcommittee of the Committee on Interstate and Foreign Commerce, United States Senate, 84th Cong., 2d Sess., on S. 2167, p. 70.

[43] The motion asked for a judgment containing, among others, the following provisions:

1. Declaring the duty of defendant to proceed forthwith to prescribe tolls as provided by Section 12, Public Law 841, 81st Congress, propose changes in tolls as indicated by said prescription and conduct a public hearing, all according to law;

2. Enjoining and restraining the defendant from further unlawfully withholding and unreasonably delaying the prescription of tolls as provided by Section 12, Public Law 841, 81st Congress, the proposal of changes in tolls as indicated by said

spite of the pendency of their motion for summary judgment, respondents also instituted extensive discovery proceedings.

Petitioner moved to dismiss the complaint for lack of jurisdiction over the subject matter and for failure to join the United States as an indispensable party,[44] and for a stay of all other proceedings pending the determination of its motion to dismiss (Pl. App. 149a). The District Court granted this stay (Pl. App. 163a-164a) and stressed that in passing on the motion to dismiss it would concern itself only with the question whether it had jurisdiction to hear the case, and that the only answer it would give the parties would be either that it could not entertain the proceedings at all, or that it could, in which case there would "be a fresh slate and a fresh start" (Pl. App. 162a). In these circumstances, petitioner refrained from submitting affidavits and other materials controverting the allegations and data contained in the motion for summary judgment.

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prescription and the conduct of a public hearing, all according to law;

3. Commanding and directing the defendant forthwith to prescribe tolls as provided by Section 12, Public Law 841, 81st Congress, propose changes in tolls as indicated by said prescription and conduct a public hearing, all according to law;

4. Enjoining and restraining the defendant in the prescription of tolls from using accounts less favorable to the plaintiffs and their class than those determined by the General Accounting Office;

5. Retaining jurisdiction of the cause so as to issue appropriate orders and decrees that the defendant prescribe tolls, propose changes in tolls and conduct a public hearing according to law; * * * [Pl. App. 12a].

[44] This motion was supported by an affidavit addressed to issues related to petitioner's claim that the court lacked jurisdiction, but not to the merits of the controversy (Pl. App. 150a-161a).

The District Court dismissed the complaint for lack of jurisdiction (Pl. App. 165a-187a).[45] It held that Sections 411 and 412 conferred upon petitioner the discretionary power and duty to determine the time when in its judgment new tolls should be prescribed, and that this function was by no means of a ministerial nature. In addition, the District Court took the position that, inasmuch as any new tolls determined by petitioner had to be approved by the President, petitioner's rate-making activities constituted advice to the President and were not subject to judicial review, and that, in any event, respondents lacked standing to sue because the Canal Zone Code did not confer upon them any private legal right. With respect to the demand for a refund of tolls, the court held that the action was in effect one against the President and against the United States, and thus could not be maintained.

3. The Decision of the Court of Appeals

The Court of Appeals affirmed the decision of the District Court to the extent that it denied the demand for a refund. In all other respects, however, it reversed the District Court and directed that summary judgment be entered for the plaintiffs. This was done although the District Court had never passed on the plaintiffs' motion for summary judgment, and petitioner never had an opportunity to challenge that motion on the merits.

After conceding that the interpretation placed by petitioner on the statute "was reasonable from the naked words" of the statute (*infra*, p. 53), the Court

[45] We cannot find any basis for the statement by the Court of Appeals (*infra*, p. 44) that the District Court had granted summary judgment for petitioner.

of Appeals determined the merits of the case, accepted the position of the Comptroller General, and took the allegations of the complaint and those of the motion for summary judgment at their face value (*infra*, pp. 56-57). It concluded that the tolls were out of line with costs and that petitioner had failed to comply with its mandatory statutory duty to prescribe new tolls.

Having determined the merits of the case, the Court of Appeals passed to the jurisdictional issues. It held that under the statutory rate-making scheme, petitioner's activities were predominant and those of the President negligible, and that, accordingly, petitioner's functions, not being those of a mere advisor to the President, were fully subject to judicial review. The court intimated that the courts could re-examine the rates even after their approval by the President, unless he actually changed the rates proposed to him by petitioner. In reaching this result, the court was influenced by the circumstance that petitioner is a Government corporation amenable to suit and engaged in activities similar to those of private business concerns (*infra*, pp. 30-31, 60).[46] With respect to the standing-to-sue issue, the court held that the Canal Zone Code and the Hay-Pauncefote Treaty, 32 Stat. (Pt. 2) 1903, conferred actionable rights on the plaintiffs; further, that the failure of the President and Congress to remedy the alleged misinterpretation by petitioner of the Canal Zone Code, although brought to their attention, did not permit an inference of ratification, but merely meant that the President and Con-

[46] In a similar vein, the court held that the decisions pursuant to which the inferior federal courts outside the District of Columbia lacked jurisdiction to maintain mandamus proceedings were inapplicable because petitioner is a corporation and thus subject to a mandatory injunction.

gress were too busy to give redress, and the courts remained open to give relief to the plaintiffs.

4. The Scope of the Decision Below and the Applications to Stay the Proceedings Pending Review in this Court

The decision of the Court of Appeals directed the District Court to enter summary judgment for respondents in accordance with its opinion (*infra*, p. 67). In that opinion, as we have just outlined, the Court of Appeals took the position that the tolls are substantially out of line with costs and petitioner's failure to prescribe new tolls constitutes an arbitrary refusal to comply with the statutory requirements of Section 412. Since then, the Court of Appeals has indicated unmistakenly that petitioner's compliance with its judgment must result in a very substantial lowering of the Panama Canal tolls.[47] In these circumstances, the District Court presumably will feel constrained to enter a judgment conforming very closely to respondents' prayer for summary judgment.[48]

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[47] The memorandum of the Court of Appeals denying a stay of mandate, pending application to this Court for a stay of judgment, stated:

> Motion denied. *In view of the heavy accumulating loss to plaintiffs by defendant's failure to perform what this Court holds to be its legal obligation* and of the ease with which it can seek interim relief from the Supreme Court or a justice thereof if we are in error, a stay of the mandate to prevent even a beginning in the lengthy steps necessary towards compliance with the court's order is not in the interest of justice.
>
> (S.) CHARLES E. CLARK
> (S.) CARROLL C. HINCKS
>
> Dated: April 30, 1957 [Emphasis added.]

[48] *Supra*, p. fr. 43, pp. 16-17. Respondents' expectation that an order of this scope will be entered is disclosed by their (Consolidated) Memorandum in Opposition to Petitioner's Application for Stay: The judgment will undoubtedly direct that the toll rate be

Upon motion made in this Court, Mr. Justice Harlan ordered a stay of all further proceedings under the mandate of the Court of Appeals.[49] Having evaluated the questions presented by this litigation as being of such a nature "that it cannot be said that it is unlikely that certiorari will be granted", he took cognizance of the far reaching effect of this litigation on the relations of the United States with foreign governments, and concluded that petitioner, as a Government instrumentality, should not be compelled to revamp its entire toll structure before its duty to do so, and the extent thereof, if any, were finally adjudicated. 1 L. Ed. (2d) 903, 904; 77 Sup. Ct. 854.

REASONS FOR GRANTING THE WRIT

By directing petitioner to prescribe new and lower tolls for the Panama Canal, the court below has injected itself into a most significant area of intra-governmental relations, seriously disturbing the proper balance of authority and power between the three departments of the Government, as well as disrupting the basic functioning of the Canal. At the same time, the ruling directly affects this country's relations with the many other nations which are interested in the great waterway linking the Atlantic and Pacific Oceans. Under the holding of the Court of Appeals, petitioner may be compelled to propose tolls so low

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proposed on a basis of Canal activity only and without absorption of the business losses as that point was expressly ruled on by Court of Appeals [*infra*, pp. 56-57]. *Respondents will confidently argue that it also provides for the allocation formulae used by the General Accounting Office in the light of the provisions of the Government Corporation Control Act.* * * * (p. 14)." (Emphasis added.)

[49] The Court of Appeals issued its mandate although advised of the pendency of an application to a Justice for a stay.

that the President ultimately will have to disapprove them. This, in turn, may cause most serious embarrassment in our relations with foreign countries. Petitioner believes that it would be dangerous, undesirable, and wasteful if it were to prescribe new tolls before its duty to do so had been determined by the highest judicial authority.

In reaching its result, the court below disregarded the pertinent decisions of this Court and of other Courts of Appeals holding to a minimum judicial interference in these sensitive areas. It also held by necessary implication that a Government corporate agency has the ministerial duty to comply with, and the courts are bound by, the position taken by the Comptroller General in an audit report prepared under the Government Corporation Control Act, even if Congress and the President do not accept the recommendations contained in that report. This novel interpretation of the Government Corporation Control Act raises important questions of federal law which should also be settled authoritatively by this Court.

I

A. The decision below is in conflict with constant judicial holdings that the administration of federal public property, such as the Panama Canal, is subject to congressional, not judicial, control, and with the correlative rulings that a private citizen has no standing to complain of an alleged violation of the law in that limited area.

Respondents' claim [50] is based on Sections 411 and

[50] Cf. Complaint, par. 3 (Pl. App. 2a); affidavit in support of motion for summary judgment par. 3 (Pl. App. 16a).

412 of Title 2 of the Panama Canal Code which are concerned with the administration of, and the condition under which the public may use, the Panama Canal which is property of the United States. The authority to enact these sections thus rests on Article IV, Section 3, of the Constitution pursuant to which Congress has the power to make all needful rules and regulations respecting the property of the United States. Statutes enacted under this authority are not considered to be "of a legislative character in the highest sense of the term (Art. 4, § 3) 'but savor somewhat of mere rules prescribed by an owner of property' ". *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 474; *Butte City Water Co.* v. *Baker*, 196 U.S. 119, 126. Since Congress is considered to have here not merely the status of legislator but also that of a proprietor,[51] it is established that the administration of these statutes is subject to congressional, not judicial, control. *Alabama* v. *Texas*, 347 U.S. 272, 273; *United States* v. *San Francisco*, 310 U.S. 16, 29-30; *Light* v. *United States*, 220 U.S. 523. See also *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924, 931 (C.A. D.C.), certiorari denied, 350 U.S. 884, holding that where, under a statute involving the disposition of Government surplus electricity, Congress, as here, reserved control over those activities through the power of making annual appropriations.[52] the congressional supervision was exclusive and judicial review precluded.

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[51] *United States* v. *Midwest Oil Co.*, *ibid.*; *Light* v. *United States*, 220 U.S. 523, 536.

[52] Under Sections 102-104 of the Government Corporation Control Act, 59 Stat. 598, 31 U.S.C. 847-849, petitioner's budget has to be approved by Congress and the expenditures for operating and administrative expenses have to be appropriated annually.

It follows that an individual does not have standing to complain either of the alleged violation of a statute concerning the administration of public property (*Perkins* v. *Lukens Steel Co.*, 310 U.S. 113) or of the violation of a treaty obligation assumed by the United States with respect to such property (*Skiriotes* v. *Florida*, 313 U.S. 69, 72-74). Statutes or treaties in this area are in the nature of "a self imposed restraint for violation of which the Government—but not private litigants can complain", and are "not intended to be a bestowal of litigable rights upon those desirous" to use the public property. *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127.

In other words, any duty created by the Canal Zone Code is owed to the petitioner's "superior executive and legislative authority" (310 U.S. at 129) and not to respondents. Noncompliance with the terms of the Code does not violate any duty owed to respondents, and, conversely, it does not invade any legal right of theirs. Any financial loss to respondents resulting from the alleged violation by petitioner of Sections 411 and 412, accordingly, is *damnum absque injuria* and does not confer upon them standing to obtain judicial redress. *Perkins* v. *Lukens Steel Co.*, *supra*, at 125; *Stark* v. *Wickard*, 321 U.S. 288, 304.[53]

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[53] Congress, of course, can confer a judicial remedy upon a person merely financially affected by administrative action. *Associated Industries* v. *Ickes*, 134 F. 2d 694, 702 (C.A. 2), vacated as moot, 320 U.S. 707; *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924, 934, fn. 20 (C.A. D.C.), certiorari denied, 350 U.S. 884. See also Defense Production Act Amendments, 1952, Title III, Section 301, 66 Stat. 308, 41 U.S.C. 43a, granting judicial review to the determinations of the Secretary of Labor involved in *Perkins* v. *Lukens Steel Co.* In contrast to a remark in the decision below (*infra*, p. 64), the 1952 statute fully recognized, rather than overruled, the legal principles embodied in the *Perkins* case.

The Administrative Procedure Act has not relaxed the standing-to-sue requirements in the area here involved, *i.e.* that of non-regulatory administrative activities which do not affect any of respondents' specific rights.[54] Under Section 10(a) of the Administrative Procedure Act (Def. App. 4a), a person has standing to seek judicial review (a) if he suffers "legal wrong because of any agency action," *i.e.*, if a specific legal right of his or a legal duty owed to him has been violated,[55] or (b) if he is "adversely affected or aggrieved by such action within the meaning of any relevant statute." The second clause does not constitute an abandonment of the "standing" requirement by permitting anyone to obtain judicial review of every agency action on the bare allegation that it somehow prejudices him economically.[56] This reading of the Act has been specifically rejected because it "would in effect delete from Section 10(a) the phrase 'within the meaning of any relevant statute.' That view, of course, cannot be accepted". *Kansas City Power & Light Co. v. McKay*, 225 F. 2d 924, 932 (C.A. D.C.), certiorari denied, 350 U.S. 884.

The Court of Appeals for the District of Columbia

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[54] Cf. Senator McCarran's explanation of the pertinent sections of the Act on the floor of the Senate, quoting with approval the statement of the Department of Justice to the effect that Section 10(a) of the Administrative Procedure Act "reflects existing law" as stated in *Alabama Power Co. v. Ickes*, 302 U.S. 464, and *Perkins v. Lukens Steel Co., supra*; 92 Cong. Rec. 2153; *Legislative History of the Administrative Procedure Act*, S. Doc. 248, 79th Cong., 2d Sess., p. 310.

[55] *Kansas City Power & Light Co. v. McKay*, 225 F. 2d 924, 932 (C.A. D.C.), certiorari denied, 350 U.S. 884.

[56] Inasmuch as the standing requirement has its roots in the limitation of the jurisdiction of the federal courts to actual "cases" (Art. III, Section 2), it is doubtful whether Congress constitutionally could confer such broad review powers on the courts. Cf., *e.g.*, *Stark v. Wickard*, 321 U.S. 288, 304.

Circuit, the appellate court primarily responsible for the day-by-day development of federal administrative law, has interpreted Section 10(a) to refer to situations where *regulatory*[57] administrative action, directed at the plaintiff, either violates a legal right of his or adversely affects him economically. Accordingly, it has consistently held that judicial review is available to a suitor only where an administrative agency has taken regulatory action, or engaged in a "legislative declaration of rights" (cf. *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 424), or where a statute provides for judicial review.[58] *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924, 932-934 (C.A. D.C.), certiorari denied, 350 U.S. 884; *Benson* v. *Schofield*, 236 F. 2d 719, 722-723 (C.A. D.C.), certiorari denied, 352 U.S. 976; *Iowa-Illinois Gas & Electric Co.* v. *Benson*, No. 13570 (C.A. D.C.), decided February 28, 1957, now pending on petition for a writ of certiorari, No. 1036, October Term, 1956.[59] The holding below also constitutes a departure from the earlier decision of the Sec-

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[57] For the distinction between legislation resting on Article IV, Section 3 of the Constitution and statutes regulating private business and employment, see, also, *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 128, and the concurring opinion of Danaher, J., in *Mitchell* v. *Covington Mills*, 229 F. 2d 506, 511 (C.A. D.C.), certiorari denied, 350 U.S. 1002.

[58] The Canal Zone Code does not contain any express or implied provision for judicial review; on the contrary, judicial review is explicitly denied by the provision that any change in tolls is subject to the approval of the President whose action in such matter shall be final and conclusive." *Supra*, p. 10.

[59] The petition in the *Iowa-Illinois Gas & Electric Co.* case seeks to raise only the narrow question of whether the Administrative Procedure Act confers the right to obtain judicial review of the legality of a loan to a third party made under the Rural Electrification Act. It specifically disclaims any intention to rely upon any grounds, other than the Administrative Procedure Act, to support its claim of standing to sue (Pet. in No. 1036, p. 2). The Government, while recognizing that the general philosophy of the

ond Circuit in *Associated Industries* v. *Ickes*, 134 F. 2d 694, vacated as moot, 320 U.S. 707.[60]

If the new position of the Second Circuit were to be accepted, the consequences of the broadening of the standing-to-sue concept would be momentous. This enlargement would not be limited to the Panama Canal tolls but would generally require the courts to reexamine all the fees and rates charged by any federal agency or Government corporation for the use of Gov-

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Court of Appeals for the District of Columbia Circuit is basically inconsistent with the decision of the court below in the instant case, insofar as Section 10 of the Administrative Procedure Act is concerned, is opposing certiorari on the ground that the decision in the *Iowa-Illinois* case is so clearly correct and is in such accord with controlling precedents that it needs no review by this Court. Moreover, the factual situations in the two cases are entirely different.

[60] The court below also based respondents' standing on the suggestion contained in Mr. Justice Frankfurter's concurring opinion in *Joint Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 152, that a "litigant ordinarily has standing to challenge governmental action of a sort that, if taken by a private person, would create a right of action cognizable by the courts". However, even if petitioner were a private utility, mandamus would not lie to compel it to reduce allegedly excessive tolls. At common law, the user of a utility charging excessive rates could bring an action for damages or reparations, *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 436; however, as the same decision points out, this common law remedy is superseded by the modern regulatory legislation such as Sections 411 and 412, which is considered exclusive unless the common law remedy is expressly reserved (204 U.S. at 446, 447), see also *Newton* v. *Consolidated Gas Co.*, 258 U.S. 165, 177; *Central Kentucky, etc., Co.* v. *Railroad Commission*, 290 U.S. 264, 271-273. And it is significant that the court below denied respondents' reparation claim. *United States* v. *Public Utilities Commission*, 151 F. 2d 609 (C.A. D.C.), referred to below (*infra*, p. 65, fn. 36), based the consumer's right to obtain judicial review of an adverse decision of a public utility commission on the fact that the statute expressly provided for this remedy. The decision recognized that, absent this statutory grant, the consumer, being merely financially affected, would have lacked standing. 151 F. 2d at 613-614.

ernment property, services, or credit facilities. The decision below thus constitutes a drastic departure from the basic judicial attitude that the courts will not "interfere with the manner in which the Government may dispatch its own internal affairs". *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 129.

B. The ruling below also conflicts with the decisions of this Court and of the Courts of Appeals that the judiciary will not review or compel administrative action which is in the nature of advice to the President. In *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, this Court held that it could not review an order of the Civil Aeronautics Board which, like a change in the Panama Canal tolls, required the approval of the President. The reasons which led to this result were that administrative action which requires presidential approval is not final, hence, that review would be premature (333 U.S. 112-113); that such administrative action usually involves delicate, complex and technical matters and large elements of prophecy for which the judiciary has neither the aptitude, facilities, qualifications or responsibility (333 U.S. at 111);[61] and, finally, that the unrequested interposition of the courts between the President and his advisers would constitute an advisory opinion in its most obnoxious form (333 U.S. at 113). See also *Upde-*

[61] Even in the absence of a requirement of Presidential approval, administrative determinations of this type would not normally be subject to judicial review. *Chicago, B. & Q. Ry. Co.* v. *Babcock*, 204 U.S. 585, 598; *Williamsport Wire Rope Company* v. *United States*, 277 U.S. 551, 559, 561; *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, 567-568; *United States* v. *George S. Bush & Co., Inc.*, 310 U.S. 371, 380; *Switchmen's Union* v. *National Mediation Bd.*, 320 U.S. 297, 303; *Stark* v. *Wickard*, 321 U.S. 288, 310. See also *Employers Group, etc.* v. *National War Labor Board*, 143 F. 2d 145, 151 (C.A. D.C.).

graff v. Talbott, 221 F. 2d 342, 346 (C.A. 4); *United States Overseas Airlines v. Civil Aeronautics Board*, 222 F. 2d 303 (C.A. D.C.).

The court below seeks to distinguish the letter of the *Waterman* case from the one at bar; it stands, however, in irreconcilable conflict with the spirit of that decision. First, the Court of Appeals took the position that petitioner is the primary rate-maker and that the President has a far more subordinate position than he has under the Civil Aeronautics Act. The Panama Canal legislation does not support that proposition. The 1950 Act did not detract from the President's authority held by him since 1912 to make the final determination as to a change in canal tolls. According to Section 411 (*supra*, pp. 2-3):

> * * * changes in rates of tolls shall be subject to, and shall take effect upon, the approval of the President of the United States, whose action in such matters shall be final and conclusive.

The import of the 1950 statute was to afford the President a group of advisors, *i.e.*, the officers and other personnel of the Panama Canal Company, more expert in the field of canal toll rate-making than the Army officers had been (*supra*, p. 9). But the ultimate responsibility for decisions involving the consideration of the potential impact of the proposed rates upon national and international trade, national transportation policy,[62] as well as foreign policy and treaty obligations,[63] remained with him. The status of petitioner's

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[62] H. Doc. 460, 81st Cong., 2d Sess., pp. 11, 16.

[63] Hearings before the Subcommittee on the Panama Canal of the Committee on Merchant Marine and Fisheries, House of Representatives, 81st Cong., 2d Sess., on H.R. 8677, pp. 43, 86-87.

directors, who serve at the pleasure of the President's designate (*supra*, p. 7), certainly is less significant than that of the members of an independent commission, such as the Civil Aeronautics Board.

In its attempt to distinguish this case from *Waterman*, the court below also held that petitioner's refusal to prescribe new tolls constituted "a decision which has finality and is certainly effective without any approval by the President" and consequently constituted a final order reviewable by the court (*infra*, pp. 58-59). The supposed finality of the failure to prescribe rates, however, is not a sufficient distinction because *Waterman* is based only to a limited extent upon the consideration that the administrative action was not consummated prior to the presidential approval. In any event, considering the complete control the President has over petitioner's board of directors, it cannot be said that petitioner's refusal to act is final. If the President feels that petitioner's failure to act constitutes a breach of its statutory duties, he most decidedly can compel petitioner to act. Indeed, as we have suggested, the President's position with respect to petitioner is much stronger than in the case of an independent regulatory commission such as the Civil Aeronautics Board.

C. Throughout the decision below runs the notion that in this case the scope of judicial review is somehow broadened, and a departure from established precedent justified, because petitioner is a corporation engaged in business activities and subject to suit. (Cf. pp. 45, 46, 54, 60, 63, 64, 65, 67.) This argument ignores the fact that petitioner is an agency and instrumentality of the United States administering federal property. It also disregards the holdings of this Court that, as far as the Federal Government is

concerned, it is not permissible to distinguish between governmental and non-governmental activities and that all the activities of validly created Government corporations are of a governmental nature. *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95, 102; *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U.S. 466, 477; *Inland Waterways Corp.* v. *Young*, 309 U.S. 517, 523-524.

In this respect, the decision below is directly inconsistent with *N. Y. ex rel. Rogers* v. *Graves*, 299 U.S. 401, 406-408, which held that petitioner's corporate predecessor, the Panama Railroad Company, was a federal instrumentality engaged essentially in government business.[64] The Court of Appeals also failed to follow the teaching of *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 383-384, which establishes that the Government cannot simply be treated as if it were a private litigant even where it engages—either directly or through a Government corporation—in business activities analogous to those usually conducted by private enterprise.[65]

II

In its rulings on the merits of respondents' claim for mandatory relief, the decision below runs counter

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[64] That case was decided in 1937, *i.e.*, at a time when the Panama Railroad Company was still a New York corporation (cf. *supra*, p. 6, fn. 10). Since then, the Panama Railroad Company has been reincorporated under federal law and been charged with the maintenance and operation of the Panama Canal. Its business aspects thus have been vastly diminished by the legislation of 1948 and 1950.

[65] The circumstance that petitioner may sue and be sued, of couse, only means that the courts have jurisdiction over petitioner's person. It does not entail the bestowal upon the courts of jurisdiction over the subject matter of any and all types of complaint that might be filed against petitioner.

to all the rules governing the grant of mandamus, unless the decision is based upon the court's unexplained and tacit assumption that the Comptroller General's report was binding upon petitioner. This assumption is without any legal foundation, and in any event, it raises an important question of federal law not previously determined by this Court.

A. The Court of Appeals held—erroneously, as we believe we have established—that the District Court had incorrectly dismissed the complaint for lack of jurisdiction; it also went on to direct that summary judgment should be entered for respondents to the extent set forth in, and in accordance with, its opinion. The opinion held (at pp. 56-57, *infra*) that petitioner had construed the statute improperly, that its tolls were to be based exclusively on the bare cost of maintaining and operating the Panama Canal without regard to the cost of the indispensable supporting business operations, and that petitioner was not justified in exercising its business judgment with respect to future contingencies (*supra*, p. 19, *infra*, pp. 57-58).

1. The first error was the direction for entry of summary judgment in this posture of the case. Petitioner had moved to dismiss for lack of jurisdiction, and the District Court had ruled that it would consider only that motion; it had stayed all other proceedings. *Supra*, pp. 16-17. In these circumstances, and relying upon this ruling of the District Court, petitioner submitted merely a short affidavit in support of its motion to dismiss for lack of jurisdiction. It did not answer respondents' voluminuous motion for summary judgment because it was not *sub judice*, and because the need for such answer might be obviated by the expected jurisdictional ruling of the District Court. The

granting of respondents' motion for summary judgment by the Court of Appeals thus deprived petitioner of all opportunity to controvert the facts raised by the motion.[66] This constituted plain error. *Fountain* v. *Filson*, 336 U.S. 681, 683; *Kaku Nagano* v. *McGrath*, 187 F. 2d 759, 768 (C.A. 7), aff'd, 342 U.S. 916.

2. The award of mandatory relief to respondents is likewise in serious disagreement with the pertinent decisions of this Court. The court below overruled petitioner's interpretation of the statute under which it operates in spite of that court's own admission that petitioner's position was "reasonable from the naked words" (*infra*, p. 53). This was done in the face of the well-established rule that mandamus does not lie where the case involves the interpretation of a statute

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[66] The fact that petitioner's motion to dismiss for lack of jurisdiction was supported by an affidavit did not transform it into a cross-motion for summary judgment. Motions under Rule 12(b) (1)-(5) and (7) always could, and as a matter of fact usually have to, be made in the form of a speaking motion. The provision of Rule 12(b) which transforms a speaking motion into a motion for summary judgment is limited in terms to motions under Rule 12 (b)(6), the old speaking demurrer. Moore, *Federal Practice* (2d Ed.), Vol. 2, Section 12.09; pp. 2247-2257. Petitioner thus did not admit the allegations of respondents' motion for summary judgment by its failure to traverse them. Nor did petitioner's arguments that respondents lacked standing to sue and that mandamus did not lie (because the duty to prescribe new tolls involved matters entrusted to petitioner's discretion and judgment), go to the merits of the controversy. The standing issue, predicated on the existence *vel non* of a "case" within the meaning of Art. III, Section 2 of the Constitution, necessarily goes to the jurisdiction of the court. And it is well settled that the question as to whether the official has discretion or an absolute duty goes to the jurisdiction of the court to grant mandamus and not to the merits. *Marbury* v. *Madison*, 1 Cranch 137, 170; *Decatur* v. *Paulding*, 14 Pet. 497, 515-517, and see the concurring opinions of Baldwin and Catron, J. J. at 518 and 523; *U.S. ex rel. Dunlap* v. *Black*, 128 U.S. 40, 48; *Work* v. *Rives*, 267 U.S. 175, cf. *Keim* v. *United States*, 177 U.S. 290.

unless the official's or agency's interpretation thereof is "clearly erroneous" or the matter is beyond "peradventure clear." *United States ex rel. Chicago Great Western R.R. Co.* v. *Interstate Commerce Commission*, 294 U.S. 50, 61-63; *Wilbur* v. *United States*, 281 U.S. 206, 218-219. An apparently "reasonable" interpretation of a statute may be erroneous, but it cannot be said that it is "clearly erroneous" or that the matter is "not free from doubt."[67]

In overruling petitioner's methods of cost allocation and its exercise of business judgment in refusing to lower tolls in the presence of considerable potential increases in the cost of operations, the court disregarded the rule going back to *Marbury* v. *Madison*, 1 Cranch 127, 170, and *Decatur* v. *Paulding*, 14 Pet. 497, 515, that the courts do not have jurisdiction to interfere with the exercise of the very duty and discretion entrusted to the officer and agency. *Wilbur* v. *United States*, 281 U.S. 206, 218.[68] And to the extent that the

[67] A comparison of those parts of the District Court opinion dealing with the issue of statutory interpretation (Pl. App. 170a-181a) with the corresponding portions of the decision below demonstrates that the position taken by petitioner is anything but "clearly erroneous". It is, of course, our position that petitioner's interpretation of the statute is correct. This appears from the use in Section 411 of the words "authorized to prescribe and from time to time change", derived from the 1912 statute which concededly had conferred absolute discretion on the President. The holding of the court below that Congress intended the canal to operate at cost disregards Canal Zone Code, Title 2, Sections 246(d), 253, 255 (Def. App. 8(a), 13a, 20a-21a) pursuant to which excess funds not needed for authorized plant replacement and expansion are to be paid into the Treasury as dividends. Congress thus expected petitioner to recover more than the mere cost of operations.

[68] This is not the situation in which a court compels action by an agency which had refused to take any action whatsoever (cf. *Interstate Commerce Commission* v. *Humboldt S.S. Co.*, 224 U.S. 474; *Wilbur* v. *United States*, 281 U.S. 206, 218; *Virginian Ry.* v.

decision requires petitioner, not merely to determine whether new rates should be prescribed, but to prescribe new and reduced tolls in accordance with the court's interpretation of the law and facts as set forth in the opinion, the decision departs from the consistent rule that while a court may direct an agency to exercise its discretion it lacks power to control or guide the exercise of this discretion. *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U.S. 515, 551; *Wilbur* v. *United States*, 281 U.S. 206, 218.[69]

System Federation No. 40, 300 U.S. 515, 551). Under the statutory plan, the first public act to be performed by petitioner is the publication in the Federal Register of its proposal to change rates. This is preceded by petitioner's continuous observation and evaluation of the toll rates on the basis of cost, traffic and revenues (*supra*, p. 11) and the determination based upon those factors whether or not the tolls should be changed. Petitioner is constantly performing those functions (*supra*, p. 11) and its determination not to propose new rates is not based upon inaction but on the exercise of its judgment and discretion. The decision below and respondents' demand for judgment (*supra*, fn. 43, pp. 16-17) go far beyond merely compelling administrative action; they seek to direct and control the exercise of petitioner's judgment and discretion and to reverse petitioner's decisions based on the exercise of discretion and judgment that no changes in the rates are indicated and necessary at present. Cf. *Wilbur* v. *United States*, *ibid.* and *Virginian Ry.* v. *System Federation No. 40*, *ibid.*

[69] The holding that the lower federal courts outside the District of Columbia have jurisdiction to issue writs of mandamus (pp. 66-77) is in conflict with decisions of this Court such as *McIntire* v. *Wood*, 7 Cranch 504; *Rosenbaum* v. *Bauer*, 120 U.S. 450; *Knapp* v. *Lake Shore and Michigan Southern Ry. Co.*, 197 U.S. 536; *Covington and Cincinnati Bridge Co.* v. *Hager*, 203 U.S. 109; and with the recent decisions of the Courts of Appeals including *United States ex rel. Vassel* v. *Durning*, 152 F. 2d 455 (C.A. 2); *Insular Police Commission* v. *Lopez*, 160 F. 2d 673, 677 (C.A. 1); *Petrowski* v. *Nutt*, 161 F. 2d 938 (C.A. 9), certiorari denied, 333 U.S. 842; *Marshall* v. *Crotty*, 185 F. 2d 622, 627 (C.A. 1); *Biggs* v. *Ward*, 212 F. 2d 209, 211 (C.A. 7); *Updegraff* v. *Talbott*, 221 F. 2d 342, 436 (C.A. 4). The argument that lack of jurisdiction does not extend to mandatory injunctions is inconsistent with the decisions holding the man-

In accepting respondents' contention that the statutory formula required the prescription of lower tolls, and in affording an authoritative judicial interpretation of the statutory formula in advance of any proposal of new rates by petitioner and before the ensuing public rate hearings, the Court of Appeals also violated the traditional principle that courts may only review final determinations and may not render advisory legal opinions. *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 113-114, and the authorities there cited.

Finally, the court ignored the decisions holding that mandamus does not issue as of course but is awarded only in the exercise of sound judicial discretion on the basis of equitable principles. *Duncan Townsite Co.* v. *Lane*, 245 U.S. 308, 311-312; *Ex parte Skinner & Eddy Corp.*, 265 U.S. 86, 95-96; *United States* v. *Dern*, 289 U.S. 352, 360-361; *Whitehouse* v. *Illinois*, 349 U.S. 366, 373. The court failed to take into consideration the highly relevant factors that the Comptroller General did not find any equities in respondents' position; he considered the statutory cost formula, as construed by him, to be technically defective, leading to consequences

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damus and mandatory injunctions are governed by the same considerations and that the latter cannot be used in order to circumvent the District Court's lack of jurisdiction to issue original writs of mandamus. *Miguel* v. *McCarl*, 291 U.S. 442, 452; *Smith* v. *Bourbon County*, 127 U.S. 105, 112; *Warner Valley Stock Co.* v. *Smith*, 165 U.S. 28, 33; *Stevenson* v. *Holstein-Friesian Ass'n*, 30 F. 2d 625, 626 (C.A. 2); *Youngblood* v. *United States*, 141 F. 2d 912, 913 (C.A. 6). If *Virginian Ry.* v. *System Federation No. 40*, 300 U.S. 515 constitutes a departure from this rule, the Court of Appeals for the First, Fourth, Sixth, Seventh, and Ninth Circuits and until recently the Second Circuit itself, apparently have not interpreted it to that effect, and the law is in need of clarification.

Since respondents' Secretary has his office in the District of Columbia, mandatory relief is available in appropriate cases.

which are economically and financially unsound, resulting in a subsidy to respondents at the expense of taxpayers which Congress never intended to grant; and he recommended the immediate correction of the cost formula.[70]

B. The complete departure of the decision below from the accepted standards governing the exercise of mandamus powers becomes understandable only on the basis that the court, *sub silentio*, accepted respondents' theory (*supra*, p. 16) that the Comptroller General's audit reports are conclusively binding upon the courts and upon petitioner, which is subject to the absolute and ministerial duty to comply with them. This, too, was significant error.

The policy of the Government Corporation Control Act is "to bring Government corporations and their transactions and operations under annual scrutiny by the *Congress*, and provide current financial control thereof" (emphasis added). Government Corporation Control Act, Section 2, 59 Stat. 597, 31 U.S.C. 841. This annual scrutiny is obtained by the preparation by the several Government corporations of business-type budgets annually submitted to the Bureau of the Budget (Section 102, 31 U.S.C. 847). This budget, as usual

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[70] *Supra*, pp. 12-13. One of respondents' spokesmen, while testifying before a congressional committee, had to concede that while the Comptroller General agreed with their legal conclusions he did not support the "moral" result and did not consider respondents' position to be morally correct. Testimony of Robert E. Mayer, President, Pacific American Steamship Association, in *Changes in the Administration of the Panama Canal*, Hearings before the Subcommittee on Panama Canal of the Committee on Merchant Marine and Fisheries, House of Representatives, 84th Cong., 1st Sess. on H.R. 6917, etc., p. 21.

ified, amended, or revised by the President, is transmitted to Congress as part of the Annual Budget (Section 103, 31 U.S.C. 848). Congress in turn considers the budget programs of the corporations and enacts the necessary appropriations so as to make the corporate funds available for expenditures or to limit the use thereof as Congress may determine (Section 104, as amended, 31 U.S.C. 849).

The presidential and congressional scrutiny of the Government corporations is facilitated by the annual audit of their financial affairs by the General Accounting Office in accordance with the principles and procedures applicable to commercial corporated transactions (Section 105, 31 U.S.C. 850). The Comptroller General reports on this audit to Congress, and copies of this report are to be furnished to the President, the Secretary of the Treasury, and the corporation concerned. The report includes among others "such *comments and information* as may be deemed necessary to keep Congress informed of the operations and financial condition of the several corporations together with such *recommendations* with respect thereto as the Comptroller General may deem advisable * * * " and show specifically "any program, expenditure or other financial transaction or undertaking * * * which, *in the opinion* of the Comptroller General, has been carried on or made without authority of law." (Section 106, 31 U.S.C. 851 (emphasis added)).

The purpose of the Comptroller General's report thus is to make *comments* and to give information to keep Congress advised, to *make recommendations*, and to show activities which in the Comptroller General's *opinion* are illegal. Not a word permits the inference that these reports are binding upon an administrative

agency and judicially enforceable at the suit of private individuals in a situation, where as here, Congress has failed to implement the Comptroller General's views.[71]

Indeed, the legislative history of these audit provisions makes it clear that their sole purpose is to inform and to make "pertinent recommendations" to Congress[72] and they are not designed to interfere with, or bind, the activities of Government agencies or instrumentalities. This limited scope of the commercial audit provisions was highlighted from the very beginning when they were proposed as an amendment to the George Act[73] which transferred the activities of certain financial agencies from the Department of Commerce to the Federal Loan Agency.[74] When Senator Byrd introduced the commercial audit provisions on the floor of the Senate, the following colloquy occurred:

> Mr. George: And it [the commercial audit amendment] can be administered without undue interruption of the corporate functions of the various loan agencies?
>
> Mr. Byrd: The amendment does not cover. I will say to the Senator from Georgia, any question involving the making of loans except to re-

[71] There is no relation whatever between an audit report made under the Government Corporation Control Act, and a report upon the settlement of public accounts certified under the authority of Section 304 of the Budget and Accounting Act of 1921, 42 Stat. 24, 31 U.S.C. 74.

[72] S. Rept. 694, 79th Cong., 1st Sess., p. 9; H. Rept. 856, 79th Cong., 1st Sess., p. 8.

[73] Approved February 24, 1945, Section 5, 59 Stat. 6.

[74] Both reports supporting the Government Corporation Control Act point out that the commercial audit provisions contained in it merely restate without substantial change the audit provisions of the George Act. S. Rept. 694, 79th Cong., 1st Sess., p. 7; H. Rept. 856, 79th Cong., 1st Sess., p. 7.

port to Congress any loans illegally made, but does cover the auditing of loans after they are made.

Mr. George: It simply covers the auditing?

Mr. Byrd: Yes; it does not give the Comptroller General the right to deny the making of loans, but anything that is done that may be of an illegal character, in the opinion of the Comptroller General, will be reported to the Senate. [91 Cong. Rec. 687].

Statutory language and legislative history thus both refute respondents' theory, accepted by the court below, that where Congress and the President fail to take any action with respect to the recommendations contained in the Comptroller General's Audit Report, the Government corporation, nevertheless, is subject to the ministerial duty to comply with it, and that "the courts are open"[75] to enforce this supposed absolute

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[75] *Infra*, p. 65. As a matter of fact, the failure of the President and Congress to compel compliance with the Comptroller General's report has not been caused by the fact that they were too "busy" but by their disagreement with the Comptroller General's conclusions. When advised of the pendency of this action, a member of the House Committee on Appropriations (Representative Thomas) took the position that the shipping interests were fighting a preventive war, that they were suing for $27 million while they should be paying $50 million more. Representative Miller considered it unrealistic that the Canal rates had not been increased since 1937 and that they were lower than those of the Suez Canal. *Hearings on the Department of Commerce and Related Agencies Appropriations for 1957*, House of Representatives, 84th Cong., 2d Sess., pp. 691, 696-697. Actually, Congress exercises intimate and detailed control over petitioner. Cf., *e.g.*, the congressional directive referred to *supra*, p. 11; for other instances, cf. H. Rept. No. 1345, 83rd Cong., 2d Sess., p. 12; S. Rept. No. 1373, 83rd Cong., 2d Sess., p. 26. H. Rept. No. 603, 84th Cong., 1st Sess., p. 10; and H. Rept. No. 2076, 84th Cong., 2d Sess., p. 10; S. Rept. No. 2039, 84th Cong., 2d Sess., p. 7; H. (conference) Rept. No. 2344, 84th Cong., 2d Sess., pp. 3, 6, showing the control exercised

obligation without the taking of any further evidence, at the suit of any person who stands to gain financial advantage thereby. To the contrary, since petitioner's duties with respect to the canal tolls are owed exclusively to "superior executive and legislative authority" [76] the failure of Congress and the President to follow up the Comptroller General's criticism is final.

CONCLUSION

The broad question underlying this litigation is whether the tolls for the Panama Canal are to be determined by petitioner and the President to whom these functions were assigned by statute, or by the Comptroller General, or the courts. This question is of far reaching public importance and should be authoritatively determined by this Court. It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

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Assistant Attorney General.
PAUL A. SWEENEY,
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Attorneys.

JULY 1957.

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by Congress, and the assurances given by defendant to Congress, in connection with the planned abandonment of the Panama Railroad.

[76] *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 129; see *supra*, p. 24.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 111

October Term, 1956

(Argued November 13, 14, 1956. Decided April 8, 1957.)

Docket No. 24226

GRACE LINE, INC., ET AL., PLAINTIFFS-APPELLANTS,

and

NATIONAL BULK CARRIERS, INC., ET AL., INTERVENING PLAINTIFFS-APPELLANTS,

v.

PANAMA CANAL COMPANY, DEFENDANT-APPELLEE.

Before: CLARK, *Chief Judge,* and FRANK[1] and HINCKS, *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York, Lawrence E. Walsh, *Judge.*

Grace Line, Inc., and eleven other United States flag shipping lines, suing on behalf of all users of the Panama Canal, together with certain intervening plaintiffs, appeal from a dismissal, D. C. S. D. N. Y., 143 F. Supp. 539, for want of jurisdiction, of their complaint seeking to compel Panama Canal Company to prescribe tolls as required by recent congressional legislation and to recover damages for its past failure

[1] Judge Frank heard arguments in this case, but died before this opinion was prepared.

to do so. Reversed and remanded for a judgment for plaintiffs as stated.

C. DICKERMAN WILLIAMS, of Maclay, Morgan & Williams, New York City (J. Stewart Harrison, of Brobeck, Phleger & Harrison, San Francisco, Cal., and William I. Stoddard, of Maclay, Morgan & Williams, New York City, on the brief), *for plaintiffs-appellants and intervening plaintiffs-appellants.*

GEORGE COCHRAN DOUB, Asst. Atty. Gen., Washington, D. C. (Leavenworth Colby, Chief, Admiralty & Shipping Section, Dept. of Justice, Washington, D. C., Paul A. Sweeney and Herman Marcuse, Attys., Dept. of Justice, Washington, D. C., and Benjamin H. Berman, Atty. in Charge, Admiralty & Shipping Section, Dept. of Justice, New York City, on the brief, *for Panama Canal Company, defendant-appellee.*

Brief by JAMES M. ESTABROOK, New York City, as *amicus curiae* in support of plaintiffs-appellants.

CLARK, *Chief Judge:*

This appeal concerns the power of a federal district court to compel the government corporation which operates the Panama Canal to set tolls according to the new formula established by Congress in 1950 and to repay canal users several million dollars damages for excess tolls charged. It raises interesting and important questions as to judicial responsibility and authority when administrative action is dilatory or lacking.

A class action by canal users seeking this relief ended in summary judgment for the defendant below, when Judge Walsh concluded that he lacked jurisdiction over the subject matter and over an indispensable party. In brief, he interpreted the 1950 statute [2] as giving the defendant discretion to defer use of the new formula and denying judicial review of the defendant's decision. The history of toll regulation in the canal illuminates the conflicting interpretations of the most recent statute.

From 1912 to 1948 two different government bureaus operated commercial enterprises in the Canal Zone. Under 1902 legislation the President owned all the stock of Panama Railroad Company, a corporate ancestor of the present defendant which ran a railroad, a shipping line, and miscellaneous ventures. After 1912 there also existed The Panama Canal, an unincorporated agency headed by a governor whom the President appointed. This agency administered the civil government of the Canal Zone and operated the canal itself.

The President had statutory authority to fix canal tolls at his discretion between 75 cents and a dollar per laden ton, and a formula was worked out by the President, the Treasury Department, and the governor whereby tolls would be set high enough to cover operating expenses of the canal, "interest," and the cost of civil government in the Canal Zone. Canal users protested that the cost formula was unfair to them, and in later years tolls were set much lower than the formula would have required. As expenses rose, the toll rate required by the formula became greater than

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[2] Act of Sept. 26, 1950, 64 Stat. 1038, amending Title 2, §§411, 412, of the Canal Zone Code, approved June 19, 1934, 48 Stat. 1122. The Canal Zone Code does not constitute a part of the United States Code.

the statutory maximum of $1.00, while the toll remained constant at 90 cents a laden ton.

Meanwhile Panama Railroad Company, which bore very little of the burden of government in the Canal Zone, continued its highly profitable operations, returning a surplus to the Treasury. The corporation made no financial reports to Congress and was not supervised by the Bureau of the Budget or the General Accounting Office. In 1948 to obtain greater financial supervision Congress reorganized the defendant's predecessor under federal law as a government corporation,[3] subjecting it to the requirements of the Government Corporation Control Act of 1945.[4] Henceforth it was required to keep books in the fashion of a commercial business for annual submission to Congress after Presidential revision, and it was to be audited periodically by the General Accounting Office, which, in turn, reported to Congress.

The same year President Truman announced a rise in canal tolls to $1.00 per laden ton to meet continuing deficits from The Panama Canal. When the shipping industry responded with severe protests the increase was deferred pending study by congressional committees and the Bureau of the Budget. A three-cornered struggle developed. The railroads wanted to prevent what they considered a subsidy to shipping—operation of the canal below "cost." The Bureau of the Budget wanted increased revenue from the canal operation and better bookkeeping procedures. The shipping lines wanted revision of the formula for determining "costs" of the canal to enable the canal to be "self-sustaining" without greatly raising tolls.

The resulting compromise is the statute now before us. Ownership of the physical properties of the canal

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[3] Act of June 29, 1948, 62 Stat. 1075.

[4] 59 Stat. 597, 31 U. S. C. §§841-871.

was transferred from the governor's agency to the defendant corporation, now rechristened Panama Canal Company, which was to be operated by its board of directors like a commercial business, dealing with other government agencies on a business footing and meeting its expenditure from its own income. The cost of civil government in the Canal Zone was to be borne by the defendant, in lieu of taxes; and this cost was to be apportioned among the various business enterprises equitably, thus relieving the former heavy burden on the canal operation. As part of the new scheme, toll-making authority was transferred from the President to the defendant, and the statutory maxima and minima were removed. Tolls were to be set to cover costs, which were defined by statute for the first time; and the new cost formula was made more favorable to canal users than the previous informal arrangement of the President, the Treasury Department, and the governor.[5]

Both Congress and the President retained some control over toll-fixing. The annual budget reports to Congress and the periodic GAO audits required under the Government Corporation Control Act would henceforth cover the operation of the canal, now that it, too, was run by the defendant. The President retained the power to appoint the members of the defendant's board of directors, and no change in tolls could be made without his approval.

For three years after passage of the Act the defendant submitted its annual budgets to Congress, reporting a profit from its combined operations, but not allocat-

[5] The major changes were that interest during construction was no longer included in capital investment; costs of civil government were no longer borne almost exclusively by the canal users; interest was reduced to commercial rates; and military vessels were to pay for their transits. A proposal to allocate half the cost of the canal to national defense was rejected.

ing the cost of interest or civil government among its various enterprises.[6] No objections were taken to these budgets by Congress and no steps were taken by the defendant to change toll rates. The present controversy began in 1955 when the General Accounting Office completed its audit of the defendant and reported:

> "* * * * The Company, as a whole, has been self-sustaining. However, the Company did not have available for our examination an analysis to determine the financial results by activities. We have prepared such an analysis by allocating general corporate expenses (interest, net cost of Canal Zone Government and administrative and other general expenses) to the activity operating results reported by the Company. * * *
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> "The analysis of the Company, reported net income of $13,000,000 for 3 years since the reorganization shows that, contrary to the apparent expectation of the Congress, the canal activity had a net income of $28,000,000 and business activities had losses of $15,000,000. * * *
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> "* * * * Thus the net income from the canal activity is being used to offset losses from business activities.
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> "* * * * We interpret the legislation as precluding any losses sustained by the Panama Canal Company in the operation and maintenance of business facilities being included in the basis for determining tolls under section 412(b). Based on the financial results of the canal activity for the

[6] Defendant's annual reports for the fiscal years ending June 30, 1952, 1953, and 1954, were attached as exhibits to an affidavit submitted by the plaintiffs. Criticism of the defendant's reports is detailed in the Comptroller General's Audit Report to the Congress of the United States on Panama Canal Company and Canal Zone Government for the Fiscal Year Ended June 30, 1955, 29-30 (hereafter cited as 1955 Audit).

past 3 years, toll rates would have to be reduced substantially if hearings were held at this time."[7]

The GAO attributed the loss from other business activities to inefficient management, reapportionment of the burden of civil government, and a diminished market for the goods and services of these enterprises.[8] The unexpected profit of the canal operation probably stems from the steady increase in foreign commercial volume since 1947.[9] The General Accounting Office did not believe that existing legislation authorized the defendant to continue recovering business activity losses through canal tolls and unsuccessfully sought amendment of § 412(b) of the 1950 Act to accomplish that end.[10]

Judge Walsh rejected the General Accounting Office's construction of the 1950 amendments, which the plaintiffs support, and approved that of defendant Panama Canal Company. We turn first to this question of statutory interpretation.

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[7] Report on Audit of Panama Canal Zone Government for the Fiscal Year Ended June 30, 1954, 2-3.

[8] 1955 Audit, 34-36.

[9] In the four years after the transfer of the canal to the defendant, foreign toll revenues rose from $16,935,823 to $23,442,170 per year, while American tolls went from $9,986,708 to $10,407,307. 1955 Audit, 3.

Congress had recognized that future tolls would depend on the volume of traffic, *e.g.*, Sen. Rep. No. 2531, 81st Cong., 2d Sess., 5 (1950), but had not anticipated a rise in volume of such proportions. Shipping line representatives had testified that American commercial volume was declining, while government spokesmen pointed out that the total volume of commercial shipping had gone up sharply in the past year. Hearings before the Subcommittee on Maintenance and Operation of the Panama Canal of the Senate Committee on Armed Services, 81st Cong., 2d Sess. 16, 20, 39 (1950).

[10] 1955 Audit, 1-4, 19.

I. Meaning of the 1950 Statute.

A. *Statutory Text.* The old and new versions of §§ 411 and 412 are printed in the margin for comparison, since the first phase of argument concerns the significance of the changes in wording adopted in 1951.[11]

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[11] "Chapter 23.—Tolls for Use of Canal

"411. Authority [of President] to Prescribe [and Change] Measurement Rules and Tolls.—The [President] *Panama Canal* Company is authorized [subject to the provisions of the section next following] to prescribe and from time to time change *(1) the rules for the measurement of vessels for the Panama Canal, and (2), subject to the provisions of the section next following,* the tolls that shall be levied [by the Government of the United States] for the use of the Panama Canal [, but no tolls when prescribed as above shall be changed unless six months' notice is given by the President by proclamation.] *: Provided, however, That the rules of measurement, and the rates of tolls, prevailing on the effective date of this amended section shall continue in effect until changed as provided in this section: Provided further, That the said corporation shall give six months' notice by publication in the Federal Register, of any and all proposed changes in rates of tolls, during which period a public hearing shall be conducted: And provided further, That changes in basic rules of measurement and changes in rates of tolls shall be subject to, and shall take effect upon, the approval of the President of the United States whose action in such matter shall be final and conclusive.*

"412. Bases of Tolls [; Maximum and Minimum Rates].—*(a)* Tolls on merchant vessels, army and navy transports, colliers, *tankers,* hospital ships, supply ships, and yachts shall be based on net vessel-tons of one hundred cubic feet each of actual earning capacity determined in accordance with the [Rules] *rules* for the [Measurement] *measurement* of [Vessels] *vessels* for the Panama Canal, [prescribed by the President and as may be modified by him from time to time by proclamation,] and tolls on other floating craft shall be based on displacement tonnage. [Provided, That the basic rules of measurement shall not be changed except after public hearing and six months' public notice of such change. The rate of tolls on laden vessels shall not exceed $1, nor be less than $0.75 per net vessel-ton as determined under the aforesaid rules, and] *The rate of tolls* on vessels in ballast without passengers or cargo [the rate] may be less than the rate of tolls for vessels with passengers or cargo. [In addition to the tolls based on measurement or dis-

The defendant views § 411 as controlling and finds great significance in the use of the verb "authorizes," which it contrasts with the mandatory word "shall," found in other parts of the statute.[12] The plaintiffs

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placement tonnage, tolls may be levied on passengers at rates not to exceed $1.50 for each passenger.]

"(b) Tolls shall be prescribed at a rate or rates calculated to cover, as nearly as practicable, all costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto, including interest and depreciation, and an appropriate share of the net costs of operation of the agency known as the Canal Zone Government. In the determination of such appropriate share, substantial weight shall be given to the ratio of the estimated gross revenues from tolls to the estimated total gross revenues of the said corporation exclusive of the cost of commodities resold, and exclusive of revenues arising from transactions within the said corporation or from transactions with the Canal Zone Government.

"(c) Vessels operated by the United States, including warships, naval tenders, colliers, tankers, transports, hospital ships, and other vessels owned or chartered by the United States for transporting troops or supplies, may in the discretion of the President of the United States be required to pay tolls. In the event, however, that such vessels are not required to pay tolls, the tolls thereon shall nevertheless be computed and the amounts thereof shall be treated as revenues of the Panama Canal Company for the purpose of prescribing the rates of tolls, and shall be offset against the obligations of the said corporation under paragraphs (c) and (e) of section 246 of this title, as amended.

"(d) The levy of tolls is subject to the provisions of section 1 of article *III of the treaty between the United States of America and Great Britain concluded on November 18, 1901, of articles XVIII and* XIX of the convention between the United States of America and the Republic of Panama [entered into] *concluded on* November 18, 1903, and of article I of the treaty between the United States of America and the Republic of Colombia proclaimed on March 30, 1922.

"(e) Capital investment for interest purposes shall not include any interest during construction."

[12] And see, *e.g.*, *U. S. ex rel. McLennan* v. *Wilbur*, 283 U. S. 414, 418, 420; *U. S. ex rel. Simons* v. *Hines*, D. C. Cir., 69 F. 2d 229. But see *Supervisors* v. *United States*, 71 U. S. 435, 4 Wall. 435, 445-447; *United States Sugar Equalization Board* v. *P. De Ronde & Co.*, 3 Cir., 7 F. 2d 981, 985-986, certiorari dismissed 271 U. S. 691.

reply that § 411 merely identifies the person delegated with toll-fixing power and prescribes the procedure, while the obligation to set tolls according to formula flows from § 412, where the mandatory language is found.

Defendant next points to the retention in § 411 of the words "prescribe and from time to time change" which were also used in the earlier version of the statute conferring discretionary power on the President. From this we are asked to infer that similar discretionary power is to be exercised by the new authority. Plaintiffs reply that the old scheme was only discretionary within the statutory limits and that on occasion the President sought congressional approval even for changes within these limits.[13] They also cite the first section of Article III of the Hay-Pauncefote Treaty of November 18, 1901, restricting Presidential discretion by the requirement that all tolls be "just and equitable."[14]

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[13] In 1937 confusion over the statutory definition of tonnage led President Roosevelt to appoint a committee, which recommended revision of §412 to provide for measurement rules. Sen. Doc. No. 23, 75th Cong., 1st Sess. On August 24, 1937, the committee's recommendation was enacted by Congress, 50 Stat. 750, and the President revised tolls accordingly three days later. Presidential Proclamation No. 2248, 2 Fed. Reg. 1765-1774.

[14] "The United States adopts, as the basis of the neutralization of such ship canal, the following Rules, substantially as embodied in the Convention of Constantinople, signed the 28th October, 1888, for the free navigation of the Suez Canal, that is to say:

"1. The canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable." 32 Stat. 1903. The treaty is incorporated by reference into § 412(d), Tit. 2, of the Canal Zone Code.

The transposition of the phrase "subject to the provisions of the section next following" to modify the word "change," instead of the word "authorized," indicates to the defendant that the mandatory provisions of § 412 were applicable only when and if changes in tolls were attempted. Plaintiffs however contend that the transposition, if at all significant, meant only that toll-making was subject to § 412, while the rules for measuring vessels were not. The plaintiffs also say that another part of the statute making the legislation effective as of the time when the President transferred the canal to the corporation [15] answers the defendant's claim that §§ 411 and 412 fail to specify when the formula should go into effect, thus indicating discretion to delay utilizing the new scheme.

Finally, the defendant draws us to the proviso in § 411 that "the rates of tolls, prevailing on the effective date of this amended section shall continue in effect until changed as provided in this section." But this may have been intended to continue the legal authority of the old tolls fixed by the President during the interregnum when the President was no longer authorized to promulgate tolls and his corporate successor had not yet promulgated any, and would not be inconsistent with plaintiffs' position.

Summing up, the defendant would read the two sections as governing any future effort to change tolls, but leaving it entirely up to the defendant when and if any changes should be attempted. The plaintiffs just as cogently glean from the language a requirement that once the properties of the canal are given to the defendant the new formula must be applied with rea-

[15] Act of Sept. 26, 1950, § 14, 64 Stat. 1043. The transfer occurred July 1, 1951. Exec. Order No. 10263, 16 Fed. Reg. 6333.

sonable speed. Both interpretations are reasonable from the naked words, and we must seek further for their meaning.

B. *Legislative History.* During the three-year legislative progress of the statute there was no discussion of the possibility that the new law would work out to mean a drop in toll rates which the defendant might be reluctant to announce. The universal assumption of legislators and lobbyists was that the new § 412 would authorize an increase in some amount,[16] which the defendant would announce as soon as the necessary computations were completed.[17] The shipping industry, for example, lobbied to place a $1.00 maximum on tolls, holding the rise to 10 cents a laden ton.[18] The old informal formula of the President, the Treasury Department, and the governor had long indicated that an increase was in order;[19] and since 1948 the President

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[16] Hearings, *supra* note 9, at 8, 15, 28; Hearings before the Subcommittee on the Panama Canal of the House Committee on Merchant Marine and Fisheries, 81st Cong., 2d Sess. 68, 141 (1950); Sen. Rep. No. 2531, 81st Cong., 2d Sess. 5 (1950); 96 Cong. Rec. 13375, 14672 (1950).

[17] The Bureau of the Budget, which presented the bill which became law, expected the computations to take one year. A Report and Recommendations of the Bureau of the Budget, H. R. Doc. No. 460, 81st Cong., 2d Sess. 16 (1950), (hereafter, Bureau of the Budget Report); Hearings, *supra* note 16, at 48.

[18] *E.g.*, Hearings, *supra* note 16, at 76-82; Hearings, *supra* note 9, at 11-17. The proposal passed the House, but was rejected by the Senate Committee. Sen. Rep. No. 2531, 81st Cong., 2d Sess. 4 (1950).

[19] The last time the old formula indicated the propriety of reducing tolls was in 1931, and the following year the formula was revised to remove the national defense write-off of some canal costs. Hearings, *supra* note 9, at 39. At the time the 1950 statute was passed, application of the old formula would have meant an increase of from 45 to 50 cents per ton. Hearings, *supra* note 9, at 7, 17, 24.

had been impatient to proclaim the maximum statutory toll.[20] The major concern was that the defendant might be required by rising costs to raise tolls to the point where the intercoastal shipping industry could no longer compete with the railroads,[21] and the statutory proviso that toll increases be approved by the President was designed to safeguard the ship lines in that eventuality.[22]

The scope of the defendant's discretion must therefore be inferred from the general scheme of regulation which Congress created. The major change was the transfer of toll-making authority from the President to a government corporation organized on commercial lines. This was coupled with abandonment of the old statutory maxima and minima in favor of a single requirement that tolls cover costs. The latter were carefully delineated by Congress for the first time. These changes together spell an intention to change toll-making from a political decision made by the President to an economic decision made by the defendant corporation.[23]

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[20] On March 26, 1948, President Truman proclaimed a toll rise effective in six months. Presidential Proclamation No. 2775, 3 CFR 30 (1948 Supp.). The effective date was postponed to March 1, 1949, September 1, 1949, March 1, 1950, and finally March 1 1951, while Congress considered the present statute; and upon passage of the present law the original announcement of an increase was revoked. Presidential Proclamation No. 2903, 3 CFR 56 (1950 Supp.), revoking Proclamations 2775, 2808, 2831, 2852, and 2875.

[21] Hearings, *supra* note 9, at 11, 14-16, 27, 36, 39; Hearings, *supra* note 16, at 67-69, 82-83, 102-125, 133-134, 142-152.

[22] Hearings, *supra* note 9, at 7; Bureau of the Budget Report at 17.

[23] *E.g.*, "If there is agreement as to the formula for establishing the toll rates and adequate business-type accounts and financial reporting, there is no sound reason for not delegating the rate-making function to the Company's Board of Directors, as has been done in the case of other Government corporations, such as TVA, which

A certain latitude was allowed the defendant in deciding how frequently to change tolls, but this was limited by the requirement that in the long run tolls must reflect *costs*.[24] Congress was expected to review these short-range decisions with the aid of the defendant's annual budgets, but neither Congress nor the defendant was authorized to ignore the statutory formula indefinitely for reasons of policy or convenience.[25]

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set the rates to be charged for their services." Statement of Harold Seidman, Accompanied by Russell Roane, Representing the Bureau of the Budget, Hearings, *supra* note 9, at 7, and Hearings, *supra* note 16, at 46. See also Bureau of the Budget Report at 16.

Throughout the hearings and debate it was assumed that, under the new law, tolls would be set by the defendant to make the canal self-sustaining, and there was virtually no mention of the President's veto power. Hearings, *supra* note 9, at 9, 11, 18, 27, 36; Hearings, *supra* note 16, at 54, 66, 68, 133, 139; 96 Cong. Rec. 13371-13380, 14671-14672.

[24] "The present basis of establishing tolls rates does not lend itself to the ready adjustment of rates, either up or down, to reflect increases or decreases in costs or changes in commercial conditions. * * * It is significant that the tolls rates have not been changed under this formula since 1938.

"* * *

"While the tolls rate should not be changed on a year-to-year basis since 1 year's experience is insufficient to reflect accurately long-range trends, the rate should be adjusted periodically as changes take place in the factors that determine the charges that should be made for the use of the Canal. As the 1937 special committee expressed it:

" 'Economic and commercial conditions are not static. The Panama Canal is a facility for the service of interoceanic commerce. The charges for the service should receive such adjustments from time to time as will keep the charges in harmony with the needs of the Canal and the requirements that must be met in making the Canal the servant and assistant of international intercourse.' " Bureau of the Budget Report at 16.

Congress recognized the possibility that in the long run the new formula might require reduction of tolls. Bureau of the Budget Report at 16; Hearings, *supra* note 9, at 18, 36; Hearings, *supra* note 16, at 139; Sen. Rep. No. 2531, 81st Cong., 2d Sess. 5 (1950).

[25] Hearings, *supra* note 16, at 49-50.

This last power was given the President, apparently to protect the American shipping industry.[26] Exercise of the Presidential veto was hardly discussed during the legislative history of the Act, and the apparent assumption of all concerned was that as a general rule the defendant's rate changes would become law. It was clear to Congress that the Hay-Pauncefote Treaty forbade discrimination against foreign vessels, so that any Presidential veto of rate increases would have to subsidize not only American lines, but the foreign lines, which comprised more than half the canal's commercial volume.[27]

That the defendant would defer toll changes in order to apply canal profits to cover its losses in other enterprises never occurred to the legislators. Although the cost formulae of the other ventures were not spelled out in the statute, each enterprise was expected to be self-sustaining[28] and the annual commercial-style budget of the defendant corporation was expected to facilitate congressional scrutiny of the various operations. Until the GAO audit the defendant's ambiguous bookkeeping concealed the fact that the Treasury was being deprived of profits made in operating the canal, so that consumers of goods and services furnished by the other ventures could enjoy them below cost—the very type of subsidy the Government Corporation Control Act and the 1951 amendments to the Panama Canal Act were designed to prevent. The men who spent three years hammering out a compromise toll formula for future operation of the canal did not mean to give

[26] Notes 21, 22 *supra*.

[27] Hearings, *supra* note 9, at 13, 23; Hearings, *supra* note 16, at 67, 146-147; 96 Cong. Rec. 13373-13379.

[28] Bureau of the Budget Report at 14; Hearings, *supra* note 9, at 8, 18-19, 22; Hearings, *supra* note 16, at 66-67, 74; Sen. Rep. No. 2531, 81st Cong., 2d Sess. 4 (1950); H. R. Rep. No. 2935, 81st Cong., 2d Sess. 3 (1950).

the defendant's board of directors carte blanche to ignore the statutory mandate whenever the defendant's other business ventures were losing money.

We conclude that Panama Canal Company was expected to propose changes in tolls for Presidential approval whenever it became apparent that tolls were substantially out of line with costs. While it was given discretion to defer propsals of change for short periods of time where it believed the discrepancy between costs and revenue was due to a temporary factor, it could not delay such proposals unreasonably long.

II. Defendant's Asserted Discretion to Delay

Defendant contends that, even if it was required to propose changes with reasonable frequency, it has been justified in delaying action until an appraisal of the property was completed, without which depreciation and interest could not be accurately estimated.[29] The appraisal has now been finished and further delay cannot be justified on that ground.[30] It further suggests that the Korean War, pending legislation to alter § 412, and the 1955 treaty with Panama have introduced "uncertainty rendering it unwise to change tolls at the present time." It has been five years since the new formula went into effect and almost two decades since the tolls were last changed. Uncertainty has become the norm in world affairs. The legislative policy is to make tolls reflect changes in these uncertainties, and not to suspend all changes until world conditions become static;[31] further delay is not an ex-

[29] The defendant gives as its reason for not promulgating new tolls on its estimate of the property's value: "In view of the policy that tolls should remain stable over a period of years, it is evident that Congress did not intend tolls to be determined upon so tenuous and temporary a basis." Defendant-Appellee's Brief, p. 42.

[30] *Id.* p. 43.

[31] See note 24 *supra*.

ercise of the defendant's conceded discretion to determine the frequency of toll changes, but an arbitrary refusal to obey the mandatory requirement of § 412 that tolls be set in accord with costs.

III. Judicial Review of Administrative Non-Action

We thus reach the question of judicial review. Judge Walsh stated his conclusion that such review was not intended by Congress in several ways: failure to join the United States as an indispensable party; no standing to sue; inability to compel a government officer to exercise his discretion by writ of mandamus; and lack of finality in the defendant's action, which is subject to Presidential revision. On appeal defendant also suggests that a district court outside the District of Columbia lacks power to issue writs of mandamus, and that courts should not review the management of the public domain.

There is nothing in §§ 411 and 412 expressly authorizing or expressly precluding judicial review. Unless constitutional limitations exist, our power to grant relief in the premises is a matter of congressional will; and these various doctrines only point up relevant factors in our search for the silent legislative intent. We turn first to the problem of Presidential revision.

Defendant states, and we agree, that we have no power to review government decisions which are not final, and that tolls proposed by the defendant, but not yet approved by the President, lack the requisite finality. *Chicago & Southern Air Lines v. Waterman S. S. Corp.*, 333 U. S. 103; *Pan American Airways Co. v. C. A. B.*, 2 Cir., 121 F. 2d 810. In this suit, however, we are concerned not with proposed rate changes, but with the defendant's refusal to make such proposals—a decision which has finality and which is certainly effective without any approval by the

President. The defendant's refusal to start the machinery for toll changes is like a court's refusal to start the process of adjudication by granting a defendant's motion to dismiss a complaint. Such a decision is a final order, although the opposite decision, denying the motion, would not be.

From the cases of *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.*, *supra*, 333 U.S. 103, and *Pan American Airways Co.* v. *C. A. B.*, *supra*, 2 Cir., 121 F. 2d 810, the defendant argues that, where Congress establishes an agency whose decisions require Presidential approval, all judicial examination of the agency's action or inaction is precluded. But the cases will not support so broad a proposition. Both those cases dealt with the construction of § 1006 of the Civil Aeronautics Act, 49 U.S.C. § 646, which authorizes judicial review of certain orders of the Civil Aeronautics Board; and the decision of this court and the Supreme Court was that the section did not authorize review of Board orders granting or denying citizen carriers' applications for certificates of convenience and necessity to engage in overseas and foreign air transportation. Justice Jackson, writing for the Supreme Court majority, did not state the sweeping proposition now urged to us, but listed the factors which led him to conclude that § 1006 was not meant to include review of that type of agency decision: (1) Congress had expressly precluded judicial review of foreign carriers' applications to engage in foreign or overseas routes, suggesting a similar policy toward domestic carriers' applications of the identical kind; (2) air commerce, by virtue of its third dimension, novelty, and danger, poses special problems not present in the regulation of ship, truck, or train transportation; (3) aerial navigation routes and bases must be correlated with national defense plans and the conduct

of foreign relations; (4) the express scheme for review of CAB decisions was to permit it where the Board performed conventional functions and to preclude it where the Board inverted the usual administrative process and acted as adviser to the President; (5) the President's role in the statutory plan was to coordinate legislative and executive powers to further the commercial, strategic, and diplomatic interests of this country in the realm of foreign affairs.

None of these considerations are present here. The defendant is a government corporation, expressly made suable on all its decisions without reservation. The subject matter being regulated—marine transportation—is familiar to the courts, as is the process of rate-making. The defendant's decisions are not complicated by factors of diplomacy or national defense, since the Hay-Pauncefote Treaty forbids use of the canal toll-rate as a weapon of foreign policy. Accordingly the defendant's decisions will not involve national defense data and secret foreign intelligence, as was the case under the Civil Aeronautics Act.[32] The CAB's standard of "convenience and necessity" was much more vague than the formula expressed in § 412 to which the defendant corporation is to be held; and the type of CAB decisions discussed by the Supreme Court concerned the rate of expansion of the air transport industry, rather than, as here, the price to be paid by consumers to a government monopoly for services of a type frequently supplied by a public utility.[33]

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[32] *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U. S. 103, 111-112. Unlike the present law, the statute before the Supreme Court provided that CAB decisions "shall be submitted to the President before publication thereof." 49 U. S. C. § 601.

[33] At the time the present statute was passed the most comparable waterway was the Suez Canal, then privately-owned. The tolls policy in Suez was frequently compared with that in Panama. Hearings, *supra* note 9, at 34, 37; Hearings, *supra* note 16, at 69-70.

It may be significant that review was sought in the case before the Supreme Court at a much later stage than here. There "submission of the Board's decision was made to the President, who disapproved certain portions of it and advised the Board of the changes which he required. The Board complied and submitted a revised order and opinion which the President approved. Only then were they made public and that which was made public and which is before us is only the final order and opinion containing the President's amendments and bearing his approval." *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.*, *supra*, 333 U. S. 103, 110. It may well be that no judicial review would be possible once the defendant's original proposal has been altered to conform with the President's political decision,[34] but that question is not now before us.

Panama Canal Company claims that we cannot now ignore the question, however, since it would be irresponsible to mandamus the defendant to action which would then be beyond judicial scrutiny. Assuming that this is true, it appears that in the normal situation tolls would be set by the defendant and approved by the President without alteration; there would then be no obstacle to court review. Although, on occasion, the President may intervene and thus preclude judicial review of the new rates, the mere possibility of frustration should not deprive the district court of the power to take the first step. See *Virginian R. Co.* v. *System Federation No. 40*, 300 U. S. 515; *Wilbur* v. *U. S. ex rel. Kadrie*, 281 U. S. 206, 218.

135, 137-138, 142; 96 Cong. Rec. 13373; and the international treaty incorporated in § 412 (d) of the present statute was modeled on that governing the Suez Canal. See note 14 *supra*.

[34] *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.*, 333 U. S. 103, 112-114; but see *Shaughnessy* v. *Pedreiro*, 349 U. S. 48.

Nor is the defendant a mere adviser to the President of the type discussed in *United States* v. *George S. Bush & Co.*, 310 U. S. 371—a decision under the Tariff Act of 1930 (46 Stat. 590). The Act authorized the Tariff Commission to recommend increases in the statutory import duties if existing duties failed to equalize production costs of foreign and domestic articles. A recommendation to increase the duty on canned clams was approved by the President with the statutory finding that "in his judgment such rates of duty are shown by such investigation of the commission to be necessary to equalize such differences in costs of production." The Court of Customs and Patent Appeals, authorized to review "a question or questions of law only," held the increase invalid because in computing the cost of Japanese production the Commission and the President converted yen into dollars at the 1932 rate of exchange, instead of the rate of earlier years before Japan went off the gold standard. The Congress had deliberately failed to specify the year on which exchange rates should be computed, and the President's method of solving the problem was held nonreviewable by the Supreme Court. "Whatever may be the scope of appellate jurisdiction conferred by § 501 of the Tariff Act of 1930, it certainly does not permit judicial examination of the judgment of the President that the rates of duty recommended by the Commission are necessary to equalize the differences in the domestic and foreign costs of production." *United States* v. *George S. Bush & Co., supra*, 310 U. S. 371, 379. The Court carefully limited its language to tariff acts, where for a century the President had been given wide discretion to make such decisions; and it noted that the Tariff Commission had traditionally acted as an adviser only, either to Congress or to the President. The differences between the back-

ground, subject matter, and language of the tariff statute and the present law dispel any inference that Congress intended the same scope of review for canal users as for importers of foreign commodities.

Even assuming the scope of review under that statute and this one to be the same, we think the Supreme Court would have allowed the Court of Customs and Patent Appeals to act in the event the Tariff Commission, like the present defendant, boldly refused to hold any hearings concerning rate changes despite adequate indications that changes were necessary to comply with the statutory formula. The present case would be more comparable to the *Bush* decision if the present plaintiffs were trying to declare new tolls invalid because of the type of depreciation computation chosen by the agency and approved by the President.

Before 1950 the President was authorized to set tolls, and the epithet "adviser" could properly be applied to the governor of The Panama Canal. But if the changes in § 411 are to have any meaning the defendant is now the rate maker, and not a counselor. The legislative history similarly supports this.

As a last resort the defendant presses on us cases involving administration of the public domain;[35] but the problems presented by them are far removed from those of a government corporation, organized on a commercial model, charging consumers for the type of services ordinarily supplied by private enterprise. Moreover, the public domain cases have no factor anal-

[35] *E.g., United States* v. *Midwest Oil Co.*, 236 U. S. 459, 474; *Butte City Water Co.* v. *Baker*, 196 U. S. 119, 126; *Alabama* v. *Texas*, 347 U. S. 272, 273; *United States* v. *San Francisco*, 310 U. S. 16, 29-30; *Light* v. *United States*, 220 U. S. 523, 537. *Cf.* Section 4 of the Administrative Procedure Act exempting from some rule-making requirements "any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts," 60 Stat. 238, 5 U. S. C. § 1003.

ogous to the treaty—the Hay-Pauncefote Treaty, *supra*—which here binds the government to conduct its venture in a fashion that will provide fair and equitable tolls for users of all lands. Compare *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 128, 129, which the defendant cites.

The growing tendency of the courts and Congress has been to submit more matters once thought to concern internal government administration to examination in open court. See, *e.g.*, *Honorich* v. *Chapman*, D. C. Cir., 191 F. 2d 761 (Secretary of the Interior's regulations concerning Indians' wills); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123 (Attorney-General's listing of organizations for use in screening government personnel); *Shachtman* v. *Dulles*, D. C. Cir., 225 F. 2d 938 (passport denial); *Textile Workers Union of America* v. *Allendale Co.*, D. C. Cir., 226 F. 2d 765 (Walsh-Healey Act determinations reviewable under the Fulbright Amendment, 66 Stat. 308, 41 U. S. C. § 43a, which overruled *Perkins* v. *Lukens Steel Co.*, *supra*, 310 U. S. 113); Administrative Procedure Act, 5 U. S. C. § 1009(c), "every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review." We think the intent of Congress was to allow judicial review in these circumstances.

Nor is there any lack of standing to sue. Section 10(a) of the Administrative Procedure Act, 5 U. S. C. § 1009(a), confers standing on persons "suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute," and the plaintiffs can point to the Panama Canal Act of 1912, as amended in 1951, as well as the Hay-Pauncefote Treaty, as their statutory authority. Moreover, without legislation they have a right to judical redress, since the corporation's action in charging tolls in excess of the

statutory rate was "of a sort that, if taken by a private person, would create a right of action cognizable by the courts." [36] *Joint Anti-Fascist Refugee Committee* v. *McGrath*, *supra*, 341 U. S. 123, 152 (concurring opinion of Justice Frankfurter).

Here there is no controversy over the proper person to sue; all users of the canal have been joined in a single class action. The question is rather whether or not there is to be judicial review, since a finding of no standing here means that the courts have no power in the premises. See *Joint Anti-Fascist Refugee Committee* v. *McGrath*, *supra*, 341 U. S. 123, 186 (concurring opinion of Justice Jackson). From all that has gone before we conclude that court relief was not precluded and that the plaintiffs may seek it.

A final argument is made that legislative and executive supervision is sufficient and that judicial interference will prove cumbersome. The President's power to remove members of the defendant's board of directors and his veto power are stressed in this connection, as well as the supervisory power wielded by Congress through annual appropriation bills. But identical balances and checks rein most government agencies whose decisions are nevertheless subject to judicial scrutiny. For the person unable to get redress from the busy legislature or White House the courts remain open.

IV. The United States as Indispensable Party

The holding that the United States was an indispensable party applies, as we understand the opinion

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[36] The right of a consumer to sue a utility which charges excessive tolls is established, *e.g.*, *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 436; *United States* v. *Public Utilities Commission of District of Columbia*, D. C. Cir., 151 F. 2d 609; *Richman* v. *Consolidated Gas Co. of New York*, 114 App. Div. 216, 100 N. Y. S. 81, affirmed 186 N. Y. 209, 78 N. E. 871.

below, only in so far as the plaintiffs seek to recover money from the defendant, and not to the request for injunctive or mandamus relief. We do not pass on the necessity for joining the United States as defendant, since we think a money recovery is precluded by other considerations. Restitution of overcharges would require determination of the tolls that should have been set. Although the district court might reconstruct the tolls which the defendant coporation should have promulgated, there is no way of knowing whether or not the President would have approved them. Moreover, there is no statutory authority for utilizing the defendant's facilities for measuring the amount of money to be awarded the plaintiffs in suits to recover overcharges. See *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246, 253-255. We find no evidence of a congressional intent to allow recovery of overcharges.

V. Availability of the Remedy of Mandatory Injunction

Panama Canal Company's last argument rests on the doctrine that federal courts outside the District of Columbia lack statutory authority to issue writs of mandamus against government officers in the exercise of their original jurisdiction. *McIntire* v. *Wood*, 11 U. S. 504, 7 Cranch 504; *Rosenbaum* v. *Bauer*, 120 U. S. 450; *Knapp* v. *Lake Shore & M. S. R. Co.*, 197 U. S. 536; *Covington & C. Bridge Co.* v. *Hager*, 203 U. S. 109. The lower federal courts have not been consistent in handling efforts to avoid this doctrine by actions for mandatory injunctions or declaratory judgment;[37] but we need not review those cases, since the *McIntire* line of cases is inapplicable to an action like the present one

[37] See Note, 38 Col. L. Rev. 903 (1938).

against a corporation. *Virginian R. Co. v. System Federation No. 40, supra*, 300 U. S. 515, affirming 4 Cir., 84 F. 2d 641, 646. The present situation is even more favorable for issuing a mandatory injunction, since by congressional legislation the defendant was made suable in New York, rather than in the District of Columbia.

We conclude that the judgment of dismissal for the defendant should be reversed and summary judgment should be entered for the plaintiffs on their motion therefor to the extent set forth in, and in accordance with, this opinion.

Reversed and remanded for judgment for the plaintiffs.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York on the 8th day of April, one thousand nine hundred and fifty-seven.

Present: HON. CHARLES E. CLARK, Chief Judge; HON. CARROLL C. HINCKS, Circuit Judge.

GRACE LINE, INC., ET AL., PLAINTIFFS-APPELLANTS

v.

PANAMA CANAL COMPANY

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and action remanded for judgment for plaintiffs in accordance with the opinion of this Court; with costs to the appellant.

A. DANIEL FUSARO,
Clerk.

PANAMA CANAL COMPANY

Balboa Heights, Canal Zone

OFFICE OF THE PRESIDENT

June 1, 1955.

The Honorable Joseph Campbell, Comptroller General of the United States.

Dear Mr. Campbell:

After review of the report on the audit of the Panama Canal Company and Canal Zone Government for fiscal year 1954, I feel that I should communicate to you directly my views on the two new recommendations to Congress contained in the report. Those recommendations are (1) that a specific plan for liquidating the investment of the United States Government in the Panama Canal Company be incorporated into the basic legislation, and (2) that the formula for establishing toll rates be amended to include the recovery of losses sustained by the Company in the operation of business activities.

In reference to the first recommendation, as the report points out, the Company's charter now places on the Board of Directors the responsibility to appraise annually its working capital requirements, together

with reasonable foreseeable requirements for authorized plant replacement and expansion, and to pay into the Treasury as dividends the amount of funds in excess thereof. Such "dividends" are treated as applicable to reduction of past or future Government capital contributions for interest purposes.

The first new recommendation in the 1954 report would withdraw this authority by requiring annual payment into the Treasury of an amount at least equal to the depreciation and amortization for the year. The recommendation appears to be premised on the assumption that the Board of Directors has failed to pay into the Treasury funds in excess of its working capital requirements and reasonable foreseeable requirements for plant replacement and expansion. A second and somewhat inconsistent premise is that the Company should be required to pay into the Treasury all funds in excess of working capital requirements and obtain annual appropriations for plant replacement and expansion.

The propriety of the action taken to date by the Board of Directors in this connection appears to be amply supported by the Budget estimates for 1956 which project a cash deficiency in that year. It now appears that the Company's retained funds will not be sufficient to finance necessary capital improvements in fiscal year 1957, and appropriations for that purpose will probably be required in that year.

The whole purpose of the 1951 reorganization was to place the affairs of the Company on a corporate basis as distigmuished from the procedures applicable to so-called spending agencies of the Government operating with appropriated funds. The requirement that appropriations be obtained to finance all major plant replacement and expansion would in effect reverse the objective of the reorganization and to a large degree

withdraw management of the corporation from the Board of Directors. Adequate control of capital expenditures is maintained by Congress through annual review of the Company's budget program under the Government Corporation Control Act.

The second new recommendation in the 1954 report is that the formula for establishing toll rates be amended to include the recovery of "losses" sustained by the Company in the operation of business activities. This reference to "losses" in the so-called "business activities" as contrasted with a "profit" in the activities described as canal activities is misleading and creates a distorted picture of the results of operation since 1951. To arrive at the conclusion that such losses exist the report treats the canal operation and supporting activities as separate and asserts that the corporate charter now requires an allocation of general corporate expenses to each activity determined by an arbitrary fixed formula. The report does not specify any specific language of the statute requiring such allocation and the interpretation advanced by the report is contrary to the settled administrative construction by the agency charged with its administration. Furthermore the allocation of general corporate expenses in the manner suggested is at variance with our understanding of accepted principles of corporate accounting and management.

The enclosed paper prepared by my staff, in which I concur, explains the position of the Company in its construction of the corporate charter and outlines the basis for our nonconcurrence in this recommendation of the report.

Sincerely yours,

(Signed) J. S. SEYBOLD,
President.

Enclosure

COMMENT ON RECOMMENDATION OF GENERAL ACCOUNTING OFFICE REPORT FOR FISCAL YEAR 1954 FOR AMENDMENT OF FORMULA FOR ESTABLISHING TOLL RATES

The Panama Canal Company construes its charter as providing for a single operational mission—that of operating the Canal for the movement of ships from one ocean to the other. Supporting activities are maintained only to contribute to the performance of that mission, and tolls must be established at rates to cover the net cost of the entire operation. Some of the supporting activities are able incidentally to make sales or perform services for persons or organizations other than the users of the waterway. In these cases fair and reasonable prices are established with a view to recovering all direct costs and applying to general corporate expenses any recoveries over and above direct costs.

The part of the audit report that refers to "losses" in so-called business activities of the Company as contrasted with a profit in the Canal activity is misleading and creates a distorted picture of the results of operation since 1951. To arrive at this conclusion, the report treats the Canal operation and supporting activities as separate and independent with an allocation of general corporate expenses to each activity determined by an arbitrary fixed formula.

This process of allocation results in the conversion of costs into losses. Values or amounts allocated by an arbitrary formula diminished by the net operating balances are renamed losses. These same values applied to the fiscal structure of the Company as a whole produce a net return. The method suggested by the GAO inevitably implies lax management and incompetency. Few persons other than those familiar with

accounting practices of the Company would understand the process or comprehend its working.

The fixed allocation of general corporate expenses to supporting activities ignores the economic realities of the Canal enterprise and represents nothing more than an exercise in arithmetic. According to the report, the Company lost $5.4 million on non-Canal activities during the year and realized a net profit of $9.5 million on the Canal activity. Similar figures are developed in the report for the three-year period since 1951. The conclusion that non-Canal activities lost $5.4 million when in fact they contributed $4 million to general expenses and in addition bore a substantial amount of fixed operating costs such as depreciation that otherwise would have been charged to the Canal is difficult to understand.

An illustration may serve to disclose this fallacy. The Company's Industrial Division which operates a drydock and performs heavy industrial-type services, did $1,961,494 of outside business in 1954. According to analysis in the report, the Company lost $290,000 on this business. In fact, the business produced a contribution to general expenses of the Company of $282,921. In addition, if this business had not been obtained, it is estimated that the cost of work performed by the Division for the Company's own activities, primarily the Canal, aggregating $1,254,931, would have been increased by approximately $300,000. This external business, therefore, really produced a saving to the Company of more than $500,000 rather than a loss of $290,000 as computed in the report.

A somewhat similar analysis can be made for nearly every activity concerned, and the concept that the Company lost money through conducting them is at variance with the facts. If there had been no outside sales of collateral and supporting services during the

year, there would actually have been a net loss on the Canal activity alone for 1954 and not a net profit of $9.5 million.

Apart from general objections to the allocation method as a matter of sound business practice, there is no acceptable formula for the allocation of joint costs, and the percentage assigned to the various activities in the audit report fluctuates from year to year. For example, in allocating the cost of Canal Zone Government a basis was used which yielded percentages to Canal activities of 65, 63, and 55 percent for 1954, 1953, and 1952 respectively, but the use of another basis, which would provide 78 percent, is recommended on page 16 of the report.

Inevitably, the application of the allocation theory used in the audit report would result in a demand for unwarranted increases in prices charged by the supporting services. This will result in driving business away from these activities and reducing volume below the break even point, thereby leading to further demands for price increases which in turn would drive away more business. In such circumstances, allocation on a revenue basis would result in apportionment of more general corporate expenses to other activities, reflecting adversely on their results. In operating any activity, the pricing objective that will produce the greatest total benefit is that which will produce the maximum operating income *before* general corporate expense.

In the end, the audit report recognizes that under any circumstances amounts of general corporate expense not recovered by contributions from individual activities should be paid out of tolls. The report states, however, that this is not permitted by the law in its present form and recommends amendment to permit such financing.

The audit report does not point to any language of the present law requiring allocation of general corporate expenses. Instead the report states on page 5 that "the legislative hearings and reports of Congressional committees preceding the reorganization indicate the intention that the Company would be self-sustaining and the Canal and business activities would each bear its own costs of operation, including interest, depreciation, and an appropriate share of the net cost of Canal Zone Government." It is true that the statements of some of the witnesses during the hearings on the reorganization legislation, based on then current assumptions and forecasts, did express the view that each individual supporting activity would be self-supporting. But Congress, realizing the uncertainty of such projections, wisely did not write such a provision into the law and neither did it incorporate the requirement of allocation of any general or indirect expenses, other than the net cost of Canal Zone Government. Experience in operating under the reoganization legislation has fully justified the omission of such requirements, and it is recognized by all concerned that the allocation theory is unworkable.

We believe that the results obtained under the policies and practices adopted by the Company have clearly met the broad objectives of the reorganization legislation and are within the framework of the specific statutory requirements. As far as the effect upon the shipping industry is concerned, the results have been far better than the framers of the law had led the Congress to believe in their testimony. The Company has used the broad powers given to it by the law and exercised the flexibility of operating policy which the reorganization sought to bring into the enterprise. Methods of allocating costs between various classes of consumers, which were outlined by some of the wit-

nesses who testified during the hearings on the reorganization legislation, contemplated that much more could be recovered from Company-Government employees and other persons and agencies serviced by the Company in its collateral activities than has proven to be the case. This is due in part to changed economic conditions on the Isthmus and to lack at that time of adequate knowledge of market elasticity in certain areas. The Company has applied what it believes are sound business principles in meeting these changing economic conditions, and there is no question but what the results obtained from the Government's viewpoint more than justify the granting by the Congress of such operational authority to the Company.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 251.

PANAMA CANAL COMPANY,

Petitioner,

v.

GRACE LINE, INC., *et al.*,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION.

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RESPONDENTS' BRIEF IN OPPOSITION.

POINT I.

The petition is based upon a major distortion of the issues: there has been no "novel interpretation of the Government Corporation Control Act."

The theory of the petition seems to be that what is involved here is a little argument over accounting practices between the petitioner* and the Comptroller General in which neither the courts nor the respondents** have any right to meddle.

And accordingly the petition asks this Court to review an alleged "novel interpretation of the Government Corporation Control Act" (Petition, p. 22) by which the Court

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* Hereinafter referred to as "defendant".

** Hereinafter referred to as "plaintiffs".

of Appeals is supposed, in the name of that Act, to have inflicted the views of the Comptroller General on defendant.

This "novel interpretation of the Government Corporation Control Act" is simply non-existent. What the Court of Appeals did was on its own responsibility to construe the Act of September 26, 1950 as requiring the defendant to prescribe tolls based on Canal operations and without regard to the collateral activities—merely mentioning the similar views of the GAO by way of background (Petition, pp. 47-48).

The Court of Appeals did not hold and the plaintiffs did not maintain or even intimate that the GAO interpretation of the statute as requiring the prescription of tolls without regard to the losses of the collateral activities was binding on defendant. The Court of Appeals decided and plaintiffs argued the meaning of the statute on the merits.

Defendant's theory has forced it to make a statement of the controversy which is not correct and is not supported, indeed, is contradicted, by its record citations, as follows (Petition, pp. 11-12):

> "The Comptroller General's reports on the Panama Canal Company for the years 1954[30] and 1955[31] expressed the view that the Panama Canal Company had allocated to the canal operations too high a share of the cost of the Canal Zone Government, corporate overhead and interest payments, and an inadequate one to its supporting activities, most of which formerly had been administered by the Panama Railroad Company."

The Comptroller General expressed no such view in his 1954 and 1955 reports, and could not have, for the reason that defendant had, in 1954, made no allocations, and in 1955, refused to make its cost allocations available to the GAO auditors.

Thus the Comptroller General's 1954 report, cited in footnote 30, stated at p. 2 (p. 33a of the appendix to defendant's brief in the Court of Appeals):

> "However the Company did not have available for our examination an analysis to determine the financial results by activities."

The Comptroller General's 1955 report, cited at footnote 31, stated at p. 18 (this passage not included in any appendix):

> "During our 1955 audit we again requested the Company to furnish an analysis of financial results by activity. Although we were informed that an analysis had been prepared, it was not made available for our use."

The straw from which defendant seeks to create this false issue is prayer No. 4 of the complaint (8a) and of the motion for summary judgment (12a), asking that defendant in prescribing tolls use "accounts not less favorable to plaintiffs and their class than those determined by the General Accounting Office." As the context of both the complaint and the motion made clear (cf. 3a), that prayer was intended to apply only *after* the courts held, as a matter of construction of the Act of September 26, 1950, that it was defendant's duty to prescribe tolls on Canal operations only. However, the theory of prayer No. 4 was regarded as premature for presentation to the Court of Appeals; no arguments in its support were ever submitted to that Court and necessarily no such contention or theory was ever ruled on or upheld by that Court.

Thus when defendant seeks review of what it calls a "novel interpretation of the Government Corporation Control Act" (Petition, p. 22), it is asking this Court to review a ruling—novel or otherwise—that does not exist.

POINT II.

The Courts do not lack power to compel Government proprietary agencies to perform legal duties owed the citizen, and plaintiffs by virtue of Article III, Section 1, of the Hay-Pauncefote Treaty, both *per se* and by reason of its incorporation in Section 412, have the right to transit the Canal at the rates there defined.

Defendant's principal legal point appears to be that the courts cannot compel Government agencies to act in matters concerning Government property, relying on *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113.

But no one has a right to sell steel to the Government. The fixation of terms for bids is intra-governmental.

The courts have repeatedly given citizens relief when those citizens have legal rights against Government agencies, including agencies in control of Government property. For many years a substantial proportion of the cases before this Court involved suits to compel the Secretary of the Interior to recognize land claims. Government corporations control Government property, and they are now almost always, if not invariably, subject to suit. And in this case, plaintiffs have a legal right to transit the Canal at "just and equitable" rates by virtue of Article III, Section 1 of the Hay-Pauncefote Treaty, both *per se* and by reason of its incorporation in Section 412. That section of the Hay-Pauncefote Treaty reads as follows:

> "The canal shall be free and open to the vessels of commerce and war of all nations observing these Rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable."

Congress having defined "just and equitable" rates in Section 412, plaintiffs have the right to transit the Canal at the rates so defined.

POINT III.

The case falls within the rules for mandatory relief.

Defendant urges that the statutory construction is not sufficiently clear for mandatory relief.

In the cases cited by defendant the administrative officer or body had expertise in the construction of the statutes at issue. Defendant, as such, has no experience in statutory construction and its only official with legal expertise, viz., its General Counsel, appears to have interpreted the statute in the same way as the Court of Appeals, the General Accounting Office and plaintiffs, as demonstrated in plaintiffs' cross-petition at pp. 12-13. Indeed in this petition itself defendant so lacks confidence in its own theory of the statutory meaning that it is forced to raise false issues such as "novel interpretation of the Government Corporation Control Act" and alleged GAO criticism in 1954 and 1955 of its cost allocations—allocations that were not criticized, if for no other reason, because nobody knew what they were.

Again, this defendant, unlike the Government agencies involved in the cases cited by defendant, has expressly been made subject to suit "like any private corporation" (cross-petition, p. 27). *Virginia Ry. Co.* v. *Federation*, 300 U. S. 515, is conclusive that private corporations are subject to mandatory court orders to compel the performance of statutory duties as those duties are construed by the courts. Defendant cites no case in which a Government corporation subject to suit has been given the benefit of the rule upon which it relies.

Conclusion.

The petition should be denied.

Plaintiffs submit that defendant has not seriously challenged the opinion of the Court of Appeals and that argument in this Court should be limited to the questions raised by the cross-petition.

Defendant's failure to comply with the statute is costing plaintiffs and their class $25,000 a day. Because a stay has been granted, so long as the petition is pending there will not be, as put by the Court of Appeals, "even a beginning in the lengthy steps necessary toward compliance with the court's order" (cross-petition, Appx. B, 26). Plaintiffs urge that the petition be denied so that these "lengthy steps" may begin.

July, 1957.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1957

PANAMA CANAL COMPANY, PETITIONER

v.

GRACE LINE, INC., ET AL.

GRACE LINE, INC., ET AL., CROSS-PETITIONERS

v.

PANAMA CANAL COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PANAMA CANAL COMPANY

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 251

PANAMA CANAL COMPANY, PETITIONER

v.

GRACE LINE, INC., ET AL.

No. 252

GRACE LINE, INC., ET AL., CROSS-PETITIONERS

v.

PANAMA CANAL COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PANAMA CANAL COMPANY

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 213–234), is reported at 143 F. Supp. 539. The opinion of the United States Court of Appeals for the Second Circuit (R. 235–257),[1] is reported at 243 F. 2d 844.

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[1] By Chief Judge Clark for himself and Circuit Judge Hincks. Judge Frank's death occurred after the argument of the case.

JURISDICTION

The judgment of the Court of Appeals was entered on April 8, 1957 (R. 258). The petitions for writs of certiorari were filed on July 6, 1957, and were granted on October 14, 1957 (R. 264), 355 U. S. 810. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. American shipowners have instituted an action in a District Court outside the District of Columbia designed to compel petitioner, a Government agency, to prescribe new and lower tolls for the Panama Canal. This raises the following questions:[1]

a. Whether judicial review is precluded because the subject matter of the action concerns the management of federal property subject to comprehensive supervision by the President and Congress, and the administrative action requires presidential approval.

b. Whether any federal court has jurisdiction to grant relief in the nature of mandamus in this matter.

c. Whether the District Courts outside the District of Columbia have jurisdiction to grant relief in the nature of mandamus.

d. Whether respondents have standing to challenge alleged violations of a statute involving the determination of fees charged for the use of the Panama Canal, a facility belonging to the Federal Government.

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[1] These questions restate the issues comprised in the first "question presented" in the petition in No. 251 (p. 2) and in the first question reserved in footnote 3, page 2, of that petition.

2. Whether the Court of Appeals erred in granting the respondents' motion for summary judgment, which had been stayed by the District Court until after disposition of petitioner's motion to dismiss for lack of jurisdiction, and where, in reliance on that ruling, the petitioner had not answered the motion for summary judgment.

3. Whether the courts have jurisdiction retrospectively to change Panama Canal tolls under the guise of awarding damages or reparations, where the controlling statute provides that any changes in the toll rates are subject to the approval of the President.*

STATUTES INVOLVED

1. Canal Zone Code, Title 2, Sections 411 and 412, as amended by the Act of September 26, 1950, 64 Stat. 1038, provide:

> 411. *Authority to Prescribe Measurement Rules and Tolls.*—The Panama Canal Company is authorized to prescribe and from time to time change (1) the rules for the measure-

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*This question restates the second question reserved in footnote 3, page 2, of the petition in No. 251.

†In our petition for a writ of certiorari in No. 251, we also raised the following question:

"2. Whether Sections 105 and 106 of the Government Corporation Control Act impose upon a Government corporation the ministerial duty to comply with the conclusions regarding accounting, cost allocation, and statutory interpretation reached by the Comptroller General in his commercial-type audit report."

Respondents' brief in opposition, however, emphatically denies reliance upon any such proposition. This issue is thus no longer in the case. Cf. *infra*, pp. 89-90.

ment of vessels for the Panama Canal, and (2), subject to the provisions of the section next following, the tolls that shall be levied for the use of the Panama Canal: *Provided, however,* That the rules of measurement, and the rates of tolls, prevailing on the effective date of this amended section shall continue in effect until changed as provided in this section: *Provided further,* That the said corporation shall give six months' notice, by publication in the Federal Register, of any and all proposed changes in basic rules of measurement and of any and all proposed changes in rates of tolls, during which period a public hearing shall be conducted: *And provided further,* That changes in basic rules of measurement and changes in rates of tolls shall be subject to, and shall take effect upon, the approval of the President of the United States, whose action in such matter shall be final and conclusive.

412. *Bases of Tolls.*—(a) Tolls on merchant vessels, army and navy transports, colliers, tankers, hospital ships, supply ships, and yachts shall be based on net vessel-tons of one hundred cubic feet each of actual earning capacity determined in accordance with the rules for the measurement of vessels for the Panama Canal, and tolls on other floating craft shall be based on displacement tonnage. The rate of tolls on vessels in ballast without passengers or cargo may be less than the rate of tolls for vessels with passengers or cargo.

(b) Tolls shall be prescribed at a rate or rates calculated to cover, as nearly as practicable, all costs of maintaining and operating the Panama Canal, together with the facilities and

appurtenances related thereto, including interest and depreciation, and an appropriate share of the net costs of operation of the agency known as the Canal Zone Government. In the determination of such appropriate share, substantial weight shall be given to the ratio of the estimated gross revenues from tolls to the estimated total gross revenues of the said corporation exclusive of the cost of commodities resold, and exclusive of revenues arising from transactions within the said corporation or from transactions with the Canal Zone Government.

(c) Vessels operated by the United States, including warships, naval tenders, colliers, tankers, transports, hospital ships, and other vessels owned or chartered by the United States for transporting troops or supplies, may in the discretion of the President of the United States be required to pay tolls. In the event, however, that such vessels are not required to pay tolls, the tolls thereon shall nevertheless be computed and the amounts thereof shall be treated as revenues of the Panama Canal Company for the purpose of prescribing the rates of tolls, and shall be offset against the obligations of the said corporation under paragraphs (c) and (e) of section 246 of this title, as amended.

(d) The levy of tolls is subject to the provisions of section 1 of article III of the treaty between the United States of America and Great Britain concluded on November 18, 1901, of articles XVIII and XIX of the convention between the United States of America and the Republic of Panama concluded on November

18, 1903, and of article I of the treaty between the United States of America and the Republic of Colombia proclaimed on March 30, 1922:

(c) Capital investment for interest purposes shall not include any interest during construction.

2. Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. 1009, provides in pertinent part:

> SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> (a) *Right of Review.*—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.
>
> * * * * * * *

3. The Hay-Pauncefote Treaty, proclaimed by the President on February 22, 1902, 32 Stat. 1903, provides in pertinent part:

> ARTICLE III
>
> The United States adopts as the basis of the neutralization of such ship canal, the following Rules, substantially as embodied in the Convention of Constantinople, signed the 28th October, 1888, for the free navigation of the Suez Canal, that is to say:
>
> 1. The canal shall be free and open to vessels of commerce and of war of all nations observing these Rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or

subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable.

* * * * * *

4. The Act of June 29, 1948, 62 Stat. 1075; Section 2 of the Act of August 12, 1949, amending Canal Zone Code, Title 2, Sections 51 and 52, 63 Stat. 601; the Act of September 26, 1950, 64 Stat. 1038; and other relevant portions of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001, *et seq.*, are set forth in the Appendix, *infra*, pp. 147 ff.

STATEMENT

These proceedings instituted by respondents,[1] a number of American shipping companies using the Panama Canal (R. 4, 5), are designed to compel petitioner, the Panama Canal Company, (a) to prescribe new tolls for the use of the Canal, basing its computations upon accounts no less favorable to respondents than those used by the General Accounting Office, and (b) to refund tolls allegedly illegally collected in the past, claimed to mount to more than $27,000,000 (R. 8-9).

Respondents base their complaint upon certain statements in the Comptroller General's Audit Report for 1954[2] of the Panama Canal Company,[3] which are critical of some of petitioner's accounting prac-

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[1] Respondents in No. 251 and cross-petitioners in No. 252 are identical. We shall refer to them as "respondents".

[2] H. Doc. 160, 84th Cong., 1st Sess. R. 40-73.

[3] For the statutory basis of this Audit Report, see *infra*, p. 5, fn. 11.

tices.[8] The broad question presented by this litigation is whether the ultimate responsibility for the Panama Canal tolls lies with petitioner and the President, as provided for in the Canal Zone Code,[9] and with Congress, or whether, in the case of a disagreement between petitioner and the Comptroller General, financially-interested persons may adopt those parts of the Comptroller General's views which favor them, and, through judicial proceedings, compel petitioner to conduct its affairs in accord with the Comptroller General's position. We believe that a fairly detailed account of the statutes governing petitioner's corporate status and of those determining the tolls of the Panama Canal will assist in the exposition of the specific questions raised in this case.

1. THE BACKGROUND OF THIS LITIGATION

a. *The corporate organization of the Panama Canal Company.* Petitioner was created in 1950[10] by the transfer of the assets of the Panama Canal, and of the functions of operating and maintaining it, to the Panama Railroad Company, and by the change of

[8] Par. 10 of the complaint alleges that the accounting determinations of the General Accounting Office are final and binding on petitioner but not on respondents (R. 6). Par. 3 of the affidavit supporting respondents' motion for summary judgment states that this motion is based on the Comptroller General's Audit Report for 1954 (R. 13–15). Compare, however, respondents' disclaimer in their brief in opposition to the petition for certiorari in No. 251, p. 2, see *infra*, pp. 89–90.

[9] Title 2, Section 411 and 412, pp. 3–6.

[10] Act of September 26, 1950, 64 Stat. 1038, *infra*, pp. 159–169.

the latter's name to Panama Canal Company.[11] Prior to 1950, the Panama Canal was maintained and operated by the President through the Governor of the Canal Zone.[12] Certain business operations supporting the maintenance and operation of the Canal, however, were conducted by the Canal's adjunct, the Panama Railroad Company.[13] These supporting bus-

[11] For the reasons which lead to this transfer, see *infra*, pp. 14–18.

[12] Act of August 24, 1912, Section 3, 37 Stat. 561.

[13] The Panama Railroad Company was incorporated in 1849 under the laws of New York. Its entire capital stock was acquired by the United States during the construction of the Panama Canal. In 1945, it was designated a wholly-owned Government corporation. Section 101 of the Government Corporation Control Act, 59 Stat. 597, 31 U. S. C. (1946 Ed.) 846. In view of Section 304 (b) of the Government Corporation Control Act (59 Stat. 602, 31 U. S. C. 869), providing that no wholly-owned Government corporation shall operate after June 30, 1948, as an agency or instrumentality of the United States unless incorporated by act of Congress, the Act of June 29, 1948, 62 Stat. 1075 (*infra*, pp. 147–157) conferred a federal charter on the Panama Railroad Company as "an agency and instrumentality of the United States, and as an adjunct of the Panama Canal," "[f]or the purpose of conducting business operations incident to the care, maintenance, sanitation, operation, improvement, government, and protection of the Panama Canal." Canal Zone Code, Title 2, Section 245 (*infra*, p. 148).

The statement in the opinion of the Court of Appeals (R. 237) that the Act of June 29, 1948, was passed in order to subject the original Panama Railroad Company to the controls provided in the Government Corporation Control Act is not wholly correct. As we have pointed out, the Government Corporation Control Act covered the Panama Railroad Company from the day of its enactment in 1945, and the purpose of the 1948 Act, as expressed in its first section (*infra*, p. 147), was to comply with the requirement of Section 304 (b) of the Government Corporation Control Act that all wholly-owned Government corporations should be incorporated under federal law.

iness operations included the railroad across the Isthmus of Panama, a steamship line operating between the port of New York and the Canal, docks, harbor terminals and coaling plants for ships in the Isthmus, commissary stores supplying employees and ships, dry and cold storage plants for supplies, two hotels and the telephone system of the Canal Zone.[14] This Court has held that these business establishments constitute "auxiliaries primarily designed and used to aid in its [the Canal's] management and operation". *New York ex rel. Rogers* v. *Graves*, 299 U. S. 401, 406, 408. Similarly, congressional committees have found that they are "essential to the operation of the Canal, and the maintenance of employees required in the conduct of the Canal enterprise".[15] The Canal Zone Code classifies these "business operations" as facilities and appurtenances of the Canal.[16] During the five fiscal years preceding the enactment in September 1950 of the statute transferring the functions of operating and maintaining the Panama Canal to the Panama Railroad Company (*supra*, p. 8, and *infra*, pp. 14–18), the annual net operating income of

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[14] Cf. *New York ex rel. Rogers* v. *Graves*, 299 U. S. 401, 403. See also R. 174.

[15] H. Rept. No. 2396, 80th Cong., 2d Sess., pp. 1–2, R. 75; S. Rept. No. 1401, 80th Cong., 2d Sess., pp. 1–2.

[16] Title 2, Sections 51 and 52, *infra*, pp. 157–159.

the latter fluctuated between $2,438,428 in 1946 and $160,355 in 1949, averaging a little over $1,000,000.[17]

By the statute, petitioner (the Panama Canal Company) is "an agency and instrumentality of the United States" created "For the purposes of maintaining and operating the Panama Canal and of conducting business operations incident to such maintenance and operation and incident to the civil government of the Canal Zone";[18] as already noted, it is a wholly owned Government corporation within the meaning of Section 101 of the Government Corporation Control Act.[19] Its stock is held by the President

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[17] The net operating income amounted to:
1946: $2,438,428, H. Doc. 121, 81st Cong., 1st Sess., p. 2.
1947: $1,167,669, H. Doc. 121, 81st Cong., 1st Sess., p. 2.
1948: $982,692, H. Doc. 594, 81st Cong., 2d Sess., p. 4.
1949: $160,355, H. Doc. 594, 81st Cong., 2d Sess., p. 4.
1950: $557,778, H. Doc. 44, 82nd Cong., 1st Sess., p. 5.
The dividends of the Panama Railroad Company paid into the Treasury from 1904 to 1950 totaled $38,000,000. *Maintenance and Operation of the Panama Canal.* Hearing before a Subcommittee of the Committee on Armed Services, United States Senate, 81st Cong., 2d Sess. on H. R. 8677, p. 8 (R. 110).

[18] Canal Zone Code, Title 2, Section 245, as amended, 64 Stat. 1041 (*infra*, p. 164). Petitioner's corporate status is based on the Act of June 29, 1948, incorporating the Panama Railroad Company under federal law (*supra*, p. 9, fn. 13; *infra*, pp. 147–157), and the Act of September 26, 1950 (*infra*, pp. 159–169). Both Acts amend Title 2 of the Canal Zone Code.

[19] 59 Stat. 597, as amended by the Act of September 26, 1950, Section 2a (2), 64 Stat. 1038, 31 U. S. C. 846.

of the United States, or his designee called the "stockholder" (Canal Zone Code, Title 2, Section 246 (a)),[20] who appoints the directors of the Company to hold office at his pleasure.[21] The corporation has capacity to sue and be sued.[22]

b. *The authority to prescribe tolls for the Panama Canal.* Under the original Panama Canal legislation (Act of August 24, 1912, Section 5, 37 Stat. 562), the President of the United States was "authorized to prescribe and from time to time change the tolls that shall be levied by the Government of the United States for the use of the Panama Canal". Toll rates were not to be changed "unless six months' notice thereof shall have been given by the President by proclamation".[23] The toll rates were not to be less than 75¢ nor more than $1.25 per net registered ton. Acting under this authority, President Taft on November 13, 1912, prescribed the tolls for merchant vessels to be $1.20 per net vessel ton (Proclamation No. 1225, 37 Stat. 1769). The determination of the canal tolls under the 1912 statute required consideration of the tonnage of a vessel under the United States rules as well as under the Panama Canal rules

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[20] *Infra*, pp. 148–149. At present, the Secretary of the Army is the designated stockholder. H. Doc. 160, 84th Cong., 1st Sess., p. 4 (R. 45). See also R. 171.

[21] Canal Zone Code, Title 2, Section 247 (*infra*, pp. 151–152).

[22] Canal Zone Code, Title 2, Section 248 (d) (*Infra*, p. 152). Other portions of Section 248 and 249 (*Infra*, pp. 152–154), however, reserve important incidents of sovereignty to the Panama Canal Company.

[23] The Act of June 15, 1914, 38 Stat. 385, repealed the exemption from tolls of vessels engaged in the coastwise trading of the United States.

of measurement and this "dual system" of measurement enabled shipowners to reduce the basis for their toll payments, with the result that the $1.20 rate actually became fictional.[24]

The Act of August 24, 1937, 50 Stat. 750, abolished the dual system of measurement and lowered the ceiling on the tolls to $1.00 per net vessel-ton, retaining the floor of 75¢. On the basis of this authority, President Roosevelt changed the toll rates, effective March 1, 1938,[25] to 90¢ per net vessel-ton of 100 cubic feet each of actual earning capacity.[26] In 1948, President Truman, on the basis of a suggestion made in the House Appropriations Committee,[27] sought to increase the toll rate to the statutory maximum of $1.00.[28] Prompted by protests of the shipping industry (R. 237), however, Congress requested the President to postpone this rate increase and to submit a study "of the organizational aspects of all phases of the Panama Canal, including the Panama Railroad" and

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[24] 100 Cong. Rec. (Daily Ed.) A1996 (*infra*, pp. 177, 178); see also Encyclopedia Britannica, Vol. 17, pp. 173–174, Panama Canal: Administration and Finance: Tolls.

[25] Proclamation No. 2247, of August 25, 1937, 2 F. R. 1764, 1796.

[26] In view of the abolition of the dual rate of measurement (*supra*, pp. 12–13), this new rate did not necessarily constitute a lowering of the tolls. Cf. 100 Cong. Rec. (Daily Ed.) A1996 *infra*, p. 178.

[27] H. Rept. 1304, 81st Cong., 1st Sess., p. 3.

[28] Proclamation No. 2775 of March 26, 1948, 62 Stat. 1494.

to submit to Congress "his recommendations of suitable changes".[29]

On the basis of the study submitted pursuant to this congressional request and of the recommendations contained in it (H. Doc. 460, 81st Cong., 2d Sess. (R. 81–104)), Congress decided to separate the civil government functions of the Canal from its transit and business functions, and to operate the latter on a business basis by the Panama Railroad Company, to be renamed the Panama Canal Company (H. Rept. 2935, 81st Cong., 2d Sess., p. 2). At the same time, it was discovered that, if the Canal were operated at cost, the tolls would have to be raised to $1.40,[30] a clearly prohibitive figure.[31] Congress therefore decided to lower the financial burden imposed upon the Canal and its users. This goal was accomplished in several ways. The interest on the capital investment of the United States Government was lowered from 3 per centum to the going rate, or about 2.3 per

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[29] H. Rept. 1304, 81st Cong., 1st Sess., p. 7. See also 100 Cong. Rec. (Daily Ed.) A1996, *infra*, p. 179. Proclamation No. 2775, *supra*, fn. 28, was revoked by Proclamation No. 2903 of September 26, 1950, 64 Stat. A433.

[30] *Maintenance and Operation of the Panama Canal*, Hearing before a Subcommittee of the Committee on Armed Services, United States Senate, 81st Cong., 2d Sess. on H. R. 8677, September 1, 1950, pp. 7, 17 (R. 109, 126); *Miscellaneous Bills*, Hearing before the Committee on Armed Services, United States Senate, 81st Cong., 2d Sess. on S. 2222, etc., September 7, 1950, p. 18.

[31] *Miscellaneous Bills*, *supra*, fn. 30, p. 18.

centum;[32] interest accrued during the construction period was to be disregarded for the purposes of computing interest on the capital investment;[33] free transits of Government vessels were eliminated;[34] and finally the supporting business activities, previously operated by the Panama Railroad Company, were to bear a proportionate share of the cost of the Canal Zone Government from which they had hitherto been exempted.[35]

In order to carry out these objectives, Congress not only merged the functions of operating and maintaining the Canal with those of the Panama Railroad

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[32] S. Rept. 2531, 81st Cong., 2d Sess., p. 4 (R. 165); *Authorization and Provision for the Maintenance and Operation of the Panama Canal, etc.*, Hearings before the Subcommittee on Panama Canal of the Committee on Merchant Marine and Fisheries, House of Representatives, 81st Cong., 2d Sess., p. 46; *Maintenance and Operation of the Panama Canal, supra*, fn. 30, p. 7 (R. 110).

[33] *Maintenance and Operation of the Panama Canal, supra*, fn. 30, p. 8 (R. 110–111); *Miscellaneous Bills, supra*, fn. 30, pp. 18–22; H. Rept. 2935, 81st Cong., 2d Sess., p. 5; S. Rept. 2531, 81st Cong., 2d Sess., p. 4 (R. 166).

[34] H. Rept. 2935, 81st Cong., 2d Sess., p. 2; S. Rept. 2531, 81st Cong., 2d Sess., p. 4 (R. 166); *Miscellaneous Bills, supra*, fn. 30, p. 17.

[35] H. Doc. 460, 81st Cong., 2d Sess., p. 14 (R. 99); *Miscellaneous Bills, supra*, fn. 30, p. 17. S. Rept. 2531, 81st Cong., 2d Sess., p. 4 (R. 165–166), estimates that the Canal operations would pay for one half of the cost of the Canal Zone Government and the supporting activities for the other half. The report does not explain how the supporting business activities whose average annual profit amounted to $1,000,000 (*supra*, pp. 10–11) would be able to increase their income to pay one half of the Canal Zone Government, then estimated to amount to $7,000,000 per annum (cf. *Miscellaneous Bills, supra*, fn. 30, pp. 17, 19).

Company, but also amended Sections 411 and 412 of Title 2 of the Canal Zone Code dealing with the methods of prescribing tolls and with the toll formula. The new Section 411 (*supra*, pp. 3–4) authorizes the petitioner "to prescribe, and from time to time change", the tolls for the use of the Canal. If the petitioner proposes a change, it shall give six months' notice by publication in the Federal Register. Public hearings are to be conducted during this interval. Any change in the tolls, however, "shall be subject to, and shall take effect upon, the approval of the President of the United States, whose action in such matter shall be final and conclusive". Section 411 also provides that the tolls prevailing at the time of its enactment shall remain in effect until changed pursuant to the procedures set forth in that section.

Section 412 (b) *supra*, pp. 4–6, contains the formula pursuant to which the petitioner shall compute the new tolls. It provides that the tolls shall be calculated to cover as nearly as practicable all costs of maintaining and operating the canal together with the related facilities and appurtenances including interest and depreciation, and an appropriate share of the cost of the Canal Zone Government. The statute further directs that, in the computation of this "appropriate share," substantial weight is to be given

> * * * to the ratio of the estimated gross revenues from tolls to the estimated total gross revenues of the said corporation exclusive of the cost of commodities resold, and exclusive of revenues arising from transactions within

the said corporation or from transactions with the Canal Zone Government.

Congress enacted this legislation reorganizing the corporate and administrative set-up of the Panama Canal with the firm conviction that the legislation would not add any cost to the Government, and that under the new formula the Canal tolls would rise by at least 5¢ to 95¢ per ton and this would produce about $1,400,000 additional revenue for the Canal.[36] In fact, in the summer of 1953, Congress directed the Panama Canal Company to complete its current study regarding the *adequacy* of the Canal tolls.[37] In its reply to this directive, the Company set forth its methods of determining whether or not new tolls should be prescribed. It explained that it was observing and evaluating continuously whether the current rates were proper and should be maintained

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[36] Section 412 (c) (*supra*, p. 5) eliminates the free transit of Government vessels, at least for accounting purposes. Section 412 (e) (*supra*, p. 6) provides that "Capital investment for interest purposes shall not include any interest during construction." Section 246 (c) (*infra*, pp. 164–165) contains the formula pursuant to which the interest rate is to be determined by the Secretary of the Treasury "as required to reimburse the Treasury for its cost".

[37] *Miscellaneous Bills*, *supra*, fn. 30, p. 22; 96 Cong. Rec. 13372, 13373, 13375, see also *infra*, pp. 86–88.

[38] *Miscellaneous Bills*, *supra*, fn. 30, pp. 18, 22; S. Rept. 2551, 81st Cong., 2d Sess., p. 5 (R. 167); 96 Cong. Rec. 13375; see H. Doc. 160, 84th Cong., 1st Sess., p. 2 (R. 42), the opinion of the District Court, fn. 17 (R. 220–221), and *infra*, pp. 87–88.

[39] See Statement of the Managers on the Part of the House, accompanying the Conference Report on the Civil Functions Appropriations Bill, 1954, H. Rept. 889, 83d Cong., 1st Sess., p. 10.

or whether an adjustment was required, and that it would propose new tolls whenever it should conclude that changes in rates were indicated and necessary.[40]

c. *The dispute between the Comptroller General and the Panama Canal Company.* The Comptroller General's reports on the Panama Canal Company[41] for 1954[42] expressed the view that the Company had allocated too high a share of the costs of the Canal Zone Government, of the corporate overhead, and of interest payments, to the Canal operations and an inadequate one to the supporting activities, most of which formerly had been administered by the Panama Railroad Company (see *supra*, pp. 9–10). According to the Comptroller General's method of cost allocation, the Canal operations showed a large surplus, the supporting activities a commensurate deficit.[43] The

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[40] 100 Cong. Rec. (Daily Ed.) A1995 (*infra*, pp. 173–176).

[41] As noted *supra*, p. 11, petitioner is subject to the provisions of the Government Corporation Control Act. Pursuant to Section 105 of that statute (59 Stat. 599, 31 U. S. C. 850), the financial transactions of all wholly-owned Government corporations are subject to an annual audit by the General Accounting Office in "accordance with the principles and procedures applicable to commercial corporate transactions". Under Section 106 of that Act (59 Stat. 599, 31 U. S. C. 851), the Comptroller General shall report on this audit to Congress with "such comments and information as may be deemed necessary to keep Congress informed of the operations and financial condition of the several corporations, together with such recommendations with respect thereto as the Comptroller General may deem advisable * * *". See *infra*, p. 50.

[42] H. Doc. 160, 84th Cong., 1st Sess. (R. 40–73).

[43] The Comptroller General's theories concerning the proper allocation of expenses to the petitioner's several activities did not affect petitioner's over-all profit or loss.

Comptroller General also claimed that the prices charged by the supporting activities were inadequate because petitioner failed to include among the recoverable cost elements an appropriate share of the cost of the Canal Zone Government, and corporate overhead.

Having determined that, according to his method of cost allocation, the Canal operations resulted in a large surplus and those of the supporting operations in a considerable loss, the Comptroller General was of the view that, under his interpretation of Section 412 (b) of the Canal Zone Code, *supra*, pp. 4–5, the tolls had to be computed exclusively on the basis of the cost of operating the Canal without reference to the losses incident to its supporting operations—and thus would have to be lowered considerably "if hearings were held at this time" (R. 43). He agreed, however, that this result was financially and economically unsound because the losses of the supporting activities, which he conceded to be essential to the operation of the Canal and to the maintenance of its personnel, were largely attributable to fringe benefits to the Canal employees and to its users, and actually constituted a legitimate element of the Canal's cost of operations (R. 56, 59). The Comptroller General also recognized that, if under his reading of the statute this deficit of the supporting activities could not be met out of Canal tolls, funds would have to be appropriated by Congress to cover it. This meant that the Canal users, more than half of which are

of foreign registry,[44] would receive a substantial subsidy at the expense of the American taxpayers.[45] He, therefore, recommended legislation amending Section 412 (b) to provide specifically that any losses of the supporting activities should be included in the cost basis for the determination of the Canal tolls.[46]

Petitioner has advised Congress of its vigorous disagreement with the Comptroller General's audit report.[47] It considers his cost allocation methods and conclusions to be in conflict with sound business and

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[44] R. 73, 174, 183–184, 248. According to the petitioner's annual report for the fiscal year ended June 30, 1956, American vessels account for 26 per centum of the transit and 30 per centum of the tolls paid during that year. A German vessel made 54 transits during that period, H. Doc. 99, 85th Cong., 1st Sess., pp. 11–13, 63. During the preceding year a Danish vessel established a record of 55 transits. H. Doc. 351, 84th Cong., 2d Sess., p. 13.

[45] This result would be in direct conflict with the expressed congressional objective that the Canal would be totally self-supporting and that the new tolls formula would not cast any burden on the American taxpayer (*supra*, p. 17).

[46] H. Doc. 160, 84th Cong., 1st Sess., pp. 2–3, 8–9, 14, 16 (R. 43, 46–47, 56, 59).

[47] For petitioner's position, see *Operations of the Panama Canal Company*, Hearings before Subcommittee No. 3, Panama Canal, Committee on Merchant Marine and Fisheries, House of Representatives, 83d Cong., 2d Sess., pp. 8–10; *Changes in the Administration of the Panama Canal Company*, Hearings before the Subcommittee on Panama Canal of the Committee on Merchant Marine and Fisheries, House of Representatives, 84th Cong., 1st Sess., on H. R. 6917, etc., pp. 160–161; *Panama Canal (Changes in Administration)*, Hearings before the Subcommittee of the Committee on Interstate and Foreign Commerce, United States Senate, 84th Cong., 2d Sess., on S. 2167, pp. 68–70. See also the Comptroller General's Audit Report for 1956, H. Doc. 210, 85th Cong., 1st Sess., pp. 68–69.

accounting practices and without any legal foundation.[48] Petitioner objects particularly to the Comptroller General's view that the statute requires the computation of toll rates without regard to any deficit in the operation of the supporting business activities. In contrast to the Comptroller General, who realized that his reading of the statute results in an economic absurdity and therefore recommended that Section 412 (b) be amended, petitioner takes the position that this unreasonable result (which follows from the Comptroller's reading of the statute) cannot possibly represent the true congressional purpose and that no correction of the toll formula is needed.[49]

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[48] Petitioner's position, briefly, is that the statute does not require the allocation of corporation overhead and interest to the supporting business activities, and that the statutory phrase of Section 412 (b) that in the allocation of the cost of the Canal Zone Government "substantial weight shall be given to the ratio * * *" (*supra*, p. 16) does not require the use of a strictly mathematical ratio but that consideration has to be given to business and economic realities. These facts, among others, are that any substantial increase in the charges of the supporting activities will either price them out of the market (and thus create actual, as distinguished from accounting, deficits under the economic laws of diminishing return) or require the payment of higher cost-of-living allowances to Canal employees and thereby directly increase the cost of operating the Canal. See *infra*, pp. 82–84.

The Comptroller General's Report for 1956 concedes that "the Company's views on allocation of general corporate expense are valid". H. Doc. 210, 85th Cong., 1st Sess., p. 16.

[49] Petitioner considers the maintenance and operation of the Panama Canal as its primary and sole operational mission under its charter. In its opinion, the supporting business activities are maintained only in order to contribute to the performance of that mission. Accordingly, any deficit incurred

On the basis of its own methods of cost allocation, its own business judgment, and its own interpretation of Section 412, petitioner concludes that the tolls currently charged comply with the statutory toll formula and that toll changes are neither "indicated" nor "necessary".[50]

The Comptroller General's Report for 1954 was transmitted to Congress on May 16, 1955 (R. 40). Since then, Congress, fully advised of this dispute,[51] has approved the Department of Commerce and Related Agencies Appropriation Acts for 1956, 1957 and 1958, which include the budgets of the Panama Canal Company for those years based upon petitioner's interpretation of the statute and its methods of accounting and cost allocation.[52]

2. THE PROCEEDINGS IN THE DISTRICT COURT

On September 13, 1955, *i. e.*, within four months after the Comptroller General's Report for 1954 had

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by the supporting activities constitutes a cost element in the Canal operations which is recoverable under the tolls formula of Section 412 (b). Cf. the congressional documents referred to *supra*, p. 19, fn. 47, and the express congressional directive contained in Canal Zone Code, Title 2, Section 246 (e), *infra*, p. 165, making the net costs of operating the Canal Zone Government "an integral part of the costs of operation of the Panama Canal enterprise *as a whole*." (Emphasis added.) See *infra*, pp. 84–89.

[50] Cf. 100 Cong. Rec. (Daily Ed.) A1995 (*infra*, p. 174). See also *Changes in the Administration of the Panama Canal Company*, *supra*, fn. 47, p. 163, and *Panama Canal (Changes in Administration)*, *supra*, fn. 47, p. 94.

[51] Cf. *supra*, p. 20, and see also *Department of Commerce and Related Agencies Appropriations for 1957*, Hearings before a Subcommittee of the Committee on Appropriations, House of Representatives, 84th Cong., 2d Sess., pp. 691–697.

[52] 69 Stat. 235–237; 70 Stat. 322–324; 71 Stat. 78.

been submitted to Congress, respondents filed their complaint, alleging in substance that the Canal tolls were excessive, as evidenced by the Comptroller General's report, and praying for judgment requiring petitioner (a) to prescribe new tolls on the basis of the accounts proposed by the General Accounting Office, and (b) to refund the allegedly excessive tolls collected in the past (R. 4–9). Six weeks later, *i. e.*, before petitioner's 60-day time to answer had expired, respondents moved for summary judgment (R. 10–185) [53] and instituted extensive discovery proceedings (cf. R. 196, 209–210, 212–213).

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[53] The motion asked for a judgment containing, among others, the following provisions:

"1. Declaring the duty of defendant to proceed forthwith to prescribe tolls as provided by Section 12, Public Law 841, 81st Congress, propose changes in tolls as indicated by said prescription and conduct a public hearing, all according to law;

"2. Enjoining and restraining the defendant from further unlawfully withholding and unreasonably delaying the prescription of tolls as provided by Section 12, Public Law 841, 81st Congress, the proposal of changes in tolls as indicated by said prescription and the conduct of a public hearing, all according to law;

"3. Commanding and directing the defendant forthwith to prescribe tolls as provided by Section 12, Public Law 841, 81st Congress, propose changes in tolls as indicated by said prescription and conduct a public hearing, all according to law;

"4. Enjoining and restraining the defendant in the prescription of tolls from using accounts less favorable to the plaintiffs and their class than those determined by the General Accounting Office;

"5. Retaining jurisdiction of the cause so as to issue appropriate orders and decrees that the defendant prescribe tolls, propose changes in tolls and conduct a public hearing according to law; * * *." (R. 11.)

Petitioner moved to dismiss the complaint for lack of jurisdiction over the subject matter and for failure to join the United States as an indispensable party, and also moved for a stay of all other proceedings pending the determination of its motion to dismiss (R. 185, 196). The District Court granted these stays (R. 207–210, 211–212, 212–213) in order to obviate the need to answer the complex motion for summary judgment should it determine that it lacked jurisdiction to entertain the proceedings (R. 205). It stressed that in passing on the motion to dismiss it would concern itself only with the issue whether it had jurisdiction to hear the case, and that the only answer it would give the parties would be either that it could not entertain the proceedings at all, or that it could, in which case there would "be a fresh slate and a fresh start" (R. 202). In these circumstances, petitioner refrained from submitting affidavits and other materials controverting the allegations and data contained in the motion for summary judgment.

The District Court dismissed the complaint for lack of jurisdiction (R. 229, 234).[54] It held that Sections 411 and 412 of the Canal Zone Code conferred upon petitioner the discretionary power and duty to determine the time when in its judgment new tolls should be prescribed, and that this function was by no means of a ministerial nature. In addition, the District Court took the position that, inasmuch as

[54] We cannot find any basis for the statement by the Court of Appeals (R. 236) that the District Court granted summary judgment for petitioner.

any new tolls determined by petitioner had to be approved by the President, petitioner's rate-making activities constituted advice to the President and were not subject to judicial review, and that, in any event, respondents lacked standing to sue because the Canal Zone Code did not confer upon them any private legal right. With respect to the demand for a refund of tolls, the court held that the action was in effect one against the President and against the United States, and thus could not be maintained.

3. THE DECISION OF THE COURT OF APPEALS

The Court of Appeals affirmed the decision of the District Court to the extent that it denied the demand for a refund (R. 256–257). In all other respects, however, it reversed the District Court and directed that summary judgment be entered for the respondents. This was done although the District Court had never passed on the respondents' motion for summary judgment, and petitioner never had an opportunity to challenge that motion on the merits (*supra*, p. 24).

After conceding that the interpretation placed by petitioner on the statute was "reasonable from the naked words" of the statute (R. 245), the Court of Appeals determined the merits of the case, accepted the position of the Comptroller General, and took the allegations of the complaint and those of the motion for summary judgment at their face value (R. 248–249). It concluded that the tolls were out-of-line with costs and that petitioner had failed to comply

with its mandatory statutory duty to prescribe new tolls (R. 249).

Having determined the merits of the case, the Court of Appeals passed to the jurisdictional issues. It held that, under the statutory rate-making scheme, petitioner's activities were predominant and those of the President negligible, and that, accordingly, petitioner's functions, not being those of a mere advisor to the President, were fully subject to judicial review (R. 251–254). The court intimated that the courts could re-examine the rates even after their approval by the President, unless he actually changed the rates proposed to him by petitioner (R. 253). In reaching this result, the court was influenced by the circumstance that petitioner is a Government corporation amenable to suit and engaged in activities similar to those of private business concerns (R. 238, 246, 252, 255, 257).[55] With respect to the standing-to-sue issue, the court held that the Canal Zone Code and the Hay-Pauncefote Treaty, 32 Stat. (Pt. 2) 1903, conferred actionable rights on the respondents; further, that the failure of the President and Congress to remedy the alleged misinterpretation by petitioner of the Canal Zone Code, although brought to their attention, did not permit an inference of ratification, but merely meant that if the President and Congress were too busy to give redress the courts remained open to give relief to the plaintiffs.

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[55] In a similar vein, the court held that the decisions pursuant to which the inferior federal courts outside the District of Columbia lacked jurisdiction to maintain mandamus proceedings are inapplicable because petitioner is a corporation and thus subject to mandatory injunctions (R. 257).

4. THE SCOPE OF THE DECISION BELOW AND THE APPLICATIONS TO STAY THE PROCEEDINGS PENDING REVIEW IN THIS COURT

The decision of the Court of Appeals directed the District Court to enter summary judgment for respondents in accordance with its opinion (R. 257, 258). In that opinion, as we have just outlined, the Court of Appeals took the position that the tolls are substantially out-of-line with costs and that petitioner's failure to prescribe new tolls constitutes an arbitrary refusal to comply with the statutory requirements of Section 412 of the Canal Zone Code. Since then, the Court of Appeals has indicated that petitioner's compliance with its judgment must result in a very substantial lowering of the Panama tolls.[36] In these circumstances, the District Court presumably will feel constrained to enter a judgment conforming

[36] The memorandum of the Court of Appeals denying a stay of mandate, pending application to this Court for a stay of judgment (R. 259), stated:

> Motion denied. *In view of the heavy accumulating loss to plaintiffs by defendant's failure to perform what this court holds to be its legal obligation* and of the ease with which it can seek interim relief from the Supreme Court or a justice thereof if we are in error, a stay of the mandate to prevent even a beginning in the lengthy steps necessary towards compliance with the court's order is not in the interest of justice.
>
> (S.) CHARLES E. CLARK
> (S.) CARROLL C. HICKS
> U. S. C. J. J.
>
> Dated: April 30, 1957. [Emphasis added.]

very closely to respondents' prayer for summary judgment.[57]

Upon application made in this Court, Mr. Justice Harlan ordered a stay of all further proceedings under the mandate of the Court of Appeals.[58] Having evaluated the questions presented by this litigation as being of such a nature "that it cannot be said that it is unlikely that certiorari will be granted", he took cognizance of the far reaching effect of this litigation on the relations of the United States with foreign governments and concluded that petitioner, as a Government instrumentality, should not be compelled to revamp its entire toll structure before its duty to do so, and the extent thereof, if any, were finally adjudicated. (R. 261–262; 1 L. Ed. 2d 903, 904, 77 Sup. Ct. 854.)

Both sides sought review in this Court, petitioner from the direction of summary judgment in favor of respondents, the latter from the denial of their claim

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[57] *Supra, fn.* 23. Respondents' expectation that an order of this scope will be entered is disclosed by their (Consolidated) Memorandum in Opposition to Petitioner's Application for Stay: "The judgment will undoubtedly direct that the toll rate be proposed on a basis of Canal activity only and without absorption of the business losses as that point was expressly ruled on by Court of Appeals (R. 248–249). *Respondents will confidently argue that it also provides for the allocation formulae used by the General Accounting Office in the light of the provisions of the Government Corporation Control Act* * * * (p. 14)." (Emphasis added.)

[58] The Court of Appeals issued its mandate although advised of the pendency of an application to a Justice for a stay (R. 259).

for a refund. Both petitions were granted on October 14, 1957, and ordered consolidated. (R. 264, 355 U. S. 810.)

SUMMARY OF ARGUMENT

This case presents three separate issues. *First,* whether the courts have jurisdiction to compel the Panama Canal Company to prescribe new and lower tolls for the Canal; *second,* whether the court below properly directed the entry of summary judgment in favor of respondents; and, *third,* whether the courts have jurisdiction to direct a refund of tolls allegedly collected illegally in the past.

I

The courts lack jurisdiction to compel petitioner to prescribe new Canal tolls, for three independent reasons: (A) judicial review is precluded by statute; (B) the duty to prescribe new tolls is committed to agency discretion; and (C) respondents lack standing judicially to challenge the legality of the Canal tolls.

A. Judicial review of Canal toll determination is precluded by statute. Under Section 10 of the Administrative Procedure Act, the courts lack power to review agency action where it is precluded by statute, and such preclusion need not be in specific terms if an intent to forbid judicial review be clear. Here, that intent is to be inferred from four circumstances: (*1*) the statute respondents invoke is concerned with the administration of public property; (*2*) petitioner's administration of the Canal is subject to detailed supervision by President and Congress; (*3*) the

statute amends an earlier one precluding judicial review, and Congress evinced no purpose to change that rule; and (*4*) the statute requires presidential approval of any rate change.

1. Ordinarily, a statute dealing with the administration of public property—such as the Panama Canal—does not, in the absence of specific provision, contemplate judicial review. Congress, when proceeding under Art. IV, Section 3 of the Constitution, acts as a proprietor who issues rules for the use of his own property. *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 474. Any alleged illegality in the administration of these rules is normally to be remedied by President or Congress. Judicial intrusion into this area would disturb the distribution of powers and responsibilities among the three branches of Government. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 127–218. Section 4 of the Administrative Procedure Act recognizes this principle.

2. In any case, petitioner is subject to such stringent and comprehensive scrutiny by President and Congress as to preclude judicial review. The President, or his nominee, is petitioner's sole stockholder, and he has full administrative supervision over it. The Government Corporation Control Act also gives the President and Congress complete control over petitioner's fiscal affairs. The President has the power to modify, amend, and revise petitioner's budget; Congress considers the budget and passes the necessary legislation and appropriations. In addition, Congress is informed of petitioner's fiscal affairs

by the annual audit of the General Accounting Office and its review of those matters through annual appropriations negatives judicial review of the same fiscal issues. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 130; *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924, 931 (C. A. D. C.), certiorari denied, 350 U. S. 884. Judicial review in this area would either duplicate the congressional controls, or subject petitioner to the possibility of conflicting directions, one enforceable by contempt, the other one by impeachment or removal. Cf. *Mississippi* v. *Johnson*, 4 Wall. 475, 501. Congressional hearings and reports, as well as appropriation acts and directives, establish that Congress is, in fact, exercising effectively its function of supervising petitioner's fiscal affairs.

3. The current Canal statute constitutes an amendment of earlier legislation under which judicial review was not available with respect to Canal tolls. The silence of Congress, at the time it amended the legislation, is indicative of an intent to continue this pre-existing state of the law (*Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 303), and statements in the legislative history affirmatively support this view.

The statutory provision subjecting petitioner to suit merely gives the courts jurisdiction over its person; it does not enlarge their jurisdiction over the subject matter. Nor does petitioner's incorporation on commercial lines indicate an intent to subject it to unqualified judicial review of its operations. Petitioner is an agency and instrumentality of the United States created for the purpose of performing gov-

ernmental functions and essential government business (*New York ex rel. Rogers* v. *Graves*, 299 U. S. 401). All activities of validly created government corporations are of a governmental nature; they are not to be wholly assimilated to private litigants because they engage in business activities analogous to those conducted by private enterprise. *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U. S. 95, 102; *Federal Crop Insurance Corp.* v. *Merrill*, 332 U. S. 380, 383–384. The legislative history relating to an unsuccessful bill introduced in Congress in 1955 indicates that Congress itself considers that petitioner's rate determination cannot be reviewed judicially in the absence of specific statutory authorization.

4. The requirement of presidential approval of petitioner's rate determination likewise precludes judicial review. Prior to presidential approval, petitioner's acts do not constitute final agency action; and the courts lack jurisdiction to render any decision which may be overriden by the Executive. *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U. S. 103, 112–114. Perhaps more basic is the consideration that administrative action which has to be approved by the President constitutes advice to the President, and the courts do not intrude into that area. *Marbury* v. *Madison*, 1 Cranch 137, 166; *United States* v. *Bush & Co.*, 310 U. S. 371, 379–380.

Nor did petitioner's failure to propose new tolls make its action final, on the ground that there was nothing for the President to approve. The President has the power to compel petitioner to take the necessary steps if he deems it advisable. Courts will not

compel an inferior administrative officer to report to his superior or to send a particular document to him. *Yelvington* v. *Presidential Pardon & Parole Attorneys*, 211 F. 2d 642 (C. A. D. C.); *Updegraff* v. *Talbott*, 221 F. 2d 342 (C. A. 4).

The President's approval of petitioner's toll proposals is obviously a vital and independent element. Petitioner's functions are to compute the tolls as an expert rate-maker. The President is to consider policy matters such as the effect of the proposed tolls on world trade, national transportation policy, and foreign relations. The factor of presidential disapproval or modification cannot be discounted as a remote possibility. It is an integral and significant part of the statutory plan.

B. The courts below also lack jurisdiction of respondents' attempt to compel petitioner to prescribe new tolls because (1) petitioner's duties with respect to rate determinations are discretionary, and (2) in any event the only federal courts which have jurisdiction to compel official action are those located in the District of Columbia.

1. (*a*). Section 10 of the Administrative Procedure Act exempts duties committed to agency discretion from judicial review because, under our system of separation of power, courts cannot reexamine matters which have been entrusted to the discretion or the judgment of the Executive or of administrators. In particular, official action may be judicially compelled only in those instances where an official fails to perform a purely ministerial duty (*Marbury* v. *Madison*,

1 Cranch 137, 166; *Decatur* v. *Paulding*, 14 Pet. 497, 514–517), *i. e.*, when it is so plainly prescribed as to be the equivalent of a positive command. *Wilbur* v. *United States*, 281 U. S. 206, 218–219. The interpretation of a statute is frequently among the duties entrusted to agencies' discretion (*Decatur* v. *Paulding*; 14 Pet. 497, 515), and the courts will normally review an administrative interpretion in order to compel action only where the interpretation is clearly erroneous. *United States ex rel. Chicago Great Western R. R. Co.* v. *Interstate Commerce Commission*, 294 U. S. 50, 63. Judicial review by way of mandamus is not equivalent to a writ of error, *Work* v. *Rives*, 267 U. S. 183.

Moreover, rate determinations—the subject of this case—are typical of agency action basically committed to agency discretion. *New York* v. *United States*, 331 U. S. 284, 335. They require specialized knowledge, information and experience, and are not entirely susceptible of strict proof or disproof; the courts do not have the aptitude, facilities, or responsibility to reexamine such decisions for themselves. *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U. S. 103, 111; *Chicago, B. & Q. Ry. Co.* v. *Babcock*, 204 U. S. 585, 598; *Williamsport Wire Rope Company* v. *United States*, 277 U. S. 551, 559. Constitutional courts, at best, can reexamine specific issues of law or findings of fact which are arbitrary, capricious, or not supported by the evidence. *Keller* v. *Potomac Electric Co.*, 261 U. S. 428, 440–444; *Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266, 275–276. The use of the permissive word "authorize" in

Section 411 of the Canal Zone Code, in contrast with other clearly mandatory language throughout the Code, indicates that Congress is fully aware of the discretionary nature of petitioner's toll-determining duties.

(*b*). In this case respondents complain of three matters, all involving the exercise of such judgment and discretion. The determination of what constitutes an "appropriate share" of the cost of the Canal Zone Government, within the meaning of Section 412, and the allocation of petitioner's overhead, are clearly such problems committed to petitioner's discretion and business judgment. Petitioner's failure to increase the cost of the goods and services sold by its supporting business activities is likewise an exercise of its considered business judgment, because an increase in those charges might have priced the activities out of business, or might result in the elimination of employee's fringe benefits, with the result that wage increases might be required (which would, of course, raise the cost of operating the Canal).

As for petitioner's allocation of the costs of the Canal Zone Government between the Canal and the supporting business activities, its position is that the allocation is correct and, in any event, a matter entrusted to its discretion, subject to Congressional oversight. The deficit of these business activities constitutes a part of the "costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto," and is therefore recoverable through tolls under Section 412

This interpretation is fully supported by the statutory language, plan, and history, and especially by Section 246 (c) of the Canal Zone Code, *infra*, p. 165. The notion that under the Code the Canal tolls must be lowered, and that a part of the costs of petitioner's operations should be paid by federal taxpayers out of appropriated funds, runs completely counter to the financial purposes Congress sought to accomplish with the enactment of the 1950 statute under which respondents claim.

2. In any event, the District Court for the Southern District of New York, in which this action was instituted, lacks jurisdiction to maintain these proceedings which in effect seek an original writ of mandamus. This Court early interpreted the Judiciary Act of 1789 as withholding from the federal courts outside the District of Columbia the power to grant the prerogative writs, unless they were expressly authorized to do so. *McIntire* v. *Wood*, 7 Cranch 503, 504; *Covington & Cincinnati Bridge Co.* v. *Hager*, 203 U. S. 109. These rulings have never been repudiated by this Court; the lower federal courts have adhered to them to this day; they have not been affected by Rule 81 (b) of the Federal Rules of Civil Procedure, the 1948 revision of Title 28 of the United States Code, or the Administrative Procedure Act. *Blackmar* v. *Guerre*, 342 U. S. 512, 515–516; *Aktiebolaget Bofors* v. *United States*, 194 F. 2d 145, 149 (C. A. D. C.). Congress is fully aware of this state of the law. Whenever it wishes that a specific statute be enforced throughout the country in proceedings in the nature

of mandamus, it expressly confers that power. In these circumstances any change of the rule in *McIntire v. Wood*, *supra*, should come from Congress. *Missouri v. Ross*, 299 U. S. 72, 75. Respondents are not left without a remedy, if they are so entitled. The office of petitioner's Secretary is located in the District of Columbia, which is an available forum for granting mandatory relief.

The District Court's lack of jurisdiction to grant mandatory relief cannot be cured by a prayer for a mandatory injunction or for declaratory relief. A long line of decisions of this Court, beginning with *Gaines v. Thompson*, 7 Wall. 347, has established that mandamus and mandatory injunctions are legal equivalents, subject to the same rules and limitations. *Virginian Ry. Co. v. System Federation No. 40*, 300 U. S. 515, does not depart from this rule; it reaffirms it (at p. 551). Nor is the request for declaratory relief of any avail. Such relief presupposes that the federal courts have jurisdiction to award final relief of the older types. A court which cannot grant mandatory relief cannot avoid that limitation simply by "declaring" the rights of the parties. *Marshall v. Crotty*, 185 F. 2d 622 (C. A. 1).

C. Finally, respondents lack standing to challenge, in court, petitioner's administration of the toll formula.

1. Prior to the Administrative Procedure Act, standing-to-sue required either the violation of a "legal right" which is more than a mere financial interest, or a statutory review procedure in which a

person adversely affected was authorized to challenge its legality. *Tennessee Power Co.* v. *Tennessee Valley Authority*, 306 U. S. 118; *Federal Communications Commission* v. *Sanders Radio Station*, 309 U. S. 470; *Associated Industries* v. *Ickes*, 134 F. 2d 694 (C. A. 2), vacated as moot, 320 U. S. 707. The legislative history of the Administrative Procedure Act indicates that Section 10 (a) of that Act was designed to continue this distinction. There is no indication that Congress intended to confer standing on every person financially affected by administrative action, and thereby to open "a vista of litigation hitherto unrevealed." Cf. *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 480–481. This interpretation of the Procedure Act is supported by the 1952 Fulbright Amendment to the Walsh-Healey Public Contracts Act of 1936. *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924 (C. A. D. C.), certiorari denied, 350 U. S. 884; cf. *Ruth Elkhorn Coals, Inc.* v. *Mitchell*, 248 F. 2d 635 (C. A. D. C.), pending on petition for a writ of certiorari, No. 704, this Term.

2. Admittedly, the Canal Zone code does not authorize a proceeding for judicial review by a person adversely affected. Respondents accordingly have standing to sue only if they can complain of the violation of a "legal right." Even assuming that respondents would have a "legal right" here if they would have a remedy against a private person in similar circumstances (cf. *Joint Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 152 (concurring opinion of Frankfurter, J.)), there is no corresponding private remedy upon which respondents could

rely. At common law, a user could collect from a utility a refund of the amount actually paid (in the past) in excess of the reasonable rate, but respondents (on this aspect of the case) seek a prospective lowering of the tolls, a remedy which is not available at common law, and not damages or reparations. Moreover, respondents' complaint is not that petitioner charges an unreasonable rate, but that it does not prescribe the tolls according to the statutory formula; and the toll formula deviates in many respects from a "reasonable rate" as defined by this Court. Also, in the case of a *statutory* rate determination, the normal rule is that the user of the utility must rely upon such remedies as the statute provides—remedies which are not for the benefit of the user alone, but for the public at large. Common law remedies are superseded by the statute, and the user has no standing to challenge a rate determination in the absence of a statutory procedure authorizing review by a user. *City of Atlanta* v. *Ickes*, 308 U. S. 517; *Associated Industries* v. *Ickes*, 134 F. 2d 694 (C. A. 2), vacated as moot, 320 U. S. 707; *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924 (C. A. D. C.), certiorari denied, 350 U. S. 884.

Viewed against its background and in this context, the 1950 amendment to the Canal Zone Code did not create in respondents a "legal right" to have the tolls computed according to the toll formula there set forth. Cf. *Chicago Junction Case*, 264 U. S. 258, 266–267. In particular, absent specific provisions, statutes regulating the use of public property ordinarily create privileges not enforceable by judicial action. Official

duties in this area are owing not to the user, but to the Government; only the official's superior and Congress may complain if he violates them. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113. See also *supra*, pp. 30–31.

Nor does the clause of the Hay-Pauncefote Treaty in which the United States agreed that the toll charges for the use of the Canal would be "just and equitable" confer an actionable right upon respondents. First, respondents do not seek "just and equitable" but statutory tolls. Moreover, treaty obligations of the United States do not create judicially-enforceable rights in American citizens. *Skiriotes* v. *Florida*, 313 U. S. 69.

II

1. The Court of Appeals erred in directing the entry of summary judgment in respondents' favor. The decision of the District Court disposed of petitioner's motion to dismiss for lack of jurisdiction. At that time, respondents had made a motion for summary judgment which, however, had been stayed to enable the court first to pass on the jurisdictional issue. Relying on the stay, petitioner did not answer the motion for summary judgment. The grant of that motion by the court below deprived petitioner of its fundamental right to answer on the merits. *Fountain* v. *Filson*, 336 U. S. 681.

2. A proper disposition of the case if the merits are reached would be to dismiss it on the merits. Congress was notified of the dispute between petitioner and the Comptroller General in May 1955. Since

then, fully advised of this controversy, it has passed three appropriation acts based upon petitioner's interpretation of its obligations under the statutory toll formula. It can therefore be said that Congress has, in effect, ratified petitioner's construction of the statute. *Fleming* v. *Mohawk Co.*, 331 U. S. 111; *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535. For this reason, the proceedings should be dismissed, rather than remanded. *Deckert* v. *Independence Shares Corp.*, 311 U. S. 282; *Myers* v. *Bethlehem Corp.*, 303 U. S. 41. In addition, we submit that, if the Court were to consider the issue for itself, it would hold that petitioner's interpretation of the toll formula is not only reasonable but is correct.

III

Both lower courts correctly held that they lacked jurisdiction to entertain respondents' claim for a refund of the alleged illegal tolls collected in the past. The common law remedy of reparation is not available to respondents. They do not seek the return of rates collected in excess of reasonable ones, but damages on the ground that petitioner did not comply with the statutory formula. Respondents seek a statutory benefit; they are therefore bound by the terms of the statute. *Z. & F. Assets Corp.* v. *Hall*, 311 U. S. 470. And the statute expressly precludes judicial reparations proceedings. It provides that the tolls are to be determined by the President, not by the courts, and that they remain in effect until changed by the President; retroactive changes are not permissible under the statute. Moreover, the President is an indispensable party to any attempt to

interfere with his toll-determining authority. Since he cannot be joined, the proceedings must be dismissed. *Mine Safety Appliances Co.* v. *Forrestal,* 326 U. S. 371.

Even if the courts would have jurisdiction, any award of reparations would require a judicial determination of the tolls which the President would have approved if petitioner had performed its duty. This task, we submit, is not of a justiciable nature. The court would first have to determine the toll rate on the basis of the toll formula which contains many discretionary elements, and, second, would have to evaluate the course the President would have taken on the basis of the policy decisions—commercial, military, diplomatic—left to him by the statute. This obviously is not a task for the judiciary. *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.,* 333 U. S. 103.

ARGUMENT

From the time the concept of the Panama Canal became a reality, the problem of its tolls has engaged the direct attention of the President, of Congress, and of foreign nations. A multitude of interests and a complex of factors—commercial, international, defense, transportation, fiscal—have constantly borne in on this problem, and been weighed and reweighed. The courts have played no role at all in these considerations. Now, for the first time, respondents seek to inject the courts into this sensitive area directly affecting the functioning of one of the world's great international waterways—a major facility belonging to the Federal Government—and by judicial

action to compel the Government to lower the tolls for both domestic and foreign ships. As we shall show, there are several legal barriers to this result, but perhaps the crucial factors are the nature and history of the Panama Canal toll problem which infuse almost every legal issue in the case.

I

THE COURTS LACK JURISDICTION TO COMPEL PETITIONER TO LOWER THE TOLLS FOR THE USE OF THE PANAMA CANAL

Our primary position is that the courts lack authority to control or review petitioner's functions "to prescribe * * * the tolls that shall be levied for the use of the Panama Canal."[39] There are three reasons for this position: *first,* the statutory plan clearly indicates a congressional purpose to preclude judicial review; *second,* petitioner's duties with respect to the determination of new tolls are by law committed to executive discretion; and, *third,* respondents, alleging merely a financial loss, lack the requisite standing to challenge any supposed violation by petitioner of its statutory duties which are owed to the President and Congress.

[39] According to Section 411, *supra,* pp. 3–4, petitioner's functions in "prescribing" new tolls consist of the following steps: (1) the determination that new tolls are appropriate; (2) the giving of six months' notice in the Federal Register; (3) the holding of a public hearing; and (4) the submission of the matter to the President for approval.

A. JUDICIAL REVIEW OF PETITIONER'S ACTIVITIES RELATING TO THE DETERMINATION OF THE CANAL TOLLS IS PRECLUDED BY STATUTE

1. *The preclusion of judicial review need not be in express terms.* According to the introductory clause of Section 10 of the Administrative Procedure Act (*supra*, p. 6), the courts lack authority to review agency action where such review is precluded by statute. The Canal Zone Code, it is true, does not provide in so many words that petitioner's actions with respect to the determination of the Canal tolls are exempt from judicial review. The Administrative Procedure Act, however, does not require that judicial review be precluded *in haec verba*. While original drafts of the Act (S. 7 and H. Rep. 1203, 79th Cong., 1st Sess.) required that the statute *expressly* preclude review, the adverb "expressly" was eliminated during the legislative deliberations. This omission indicates that judicial review may be precluded by implication.[60]

The legislative history of the Administrative Procedure Act discloses that Congress so understood Section 10. The House Report clearly recognizes that a statute need not be specific in withholding judicial review but that in such event it "must upon its face give clear and convincing evidence of an intent to withhold it." [61] Again, when Representative Walter

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[60] See *Air Line Dispatchers Ass'n.* v. *National Mediation Bd.*, 189 F. 2d 685, 688, fn. 1 (C. A. D. C.), certiorari denied, 342 U. S. 849.

[61] H. Rept. 1980, 79th Cong., 2d Sess., p. 41. *Legislative History of the Administrative Procedure Act*, S. Doc. 248, 79th Cong., 2d Sess., p. 275. See also *Heikkila* v. *Barber*, 345 U. S. 229, 232.

explained the provisions of the Act on the floor of the House, he stated:

> Legislative intent to forbid judicial review must be, if not specific and in terms, at least clear, convincing, and unmistakable under the bill.[62]

Of similar importance is the weight given by Congress to the comments of the Attorney General on Section 10,[63] in which he took the position that the Section did not overrule decisions such as *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, which hold that the congressional intent to preclude judicial review need not be expressed but can be inferred from the contents and context of the statute.[64]

2. *The Canal Zone Code discloses a clear intent that the determination of the Canal tolls shall not be subject to judicial review.* The legislative purpose to preclude judicial review of the fixing of the Canal tolls is manifested in the following ways: *first*, the statute deals with the administration of property of the United States, normally reserved to supervision by Congress

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[62] 92 Cong. Rec. 5654, *Legislative History of the Administrative Procedure Act*, *supra*, fn. 61, p. 368.

[63] See *Legislative History of the Administrative Procedure Act*, *supra*, fn. 61, pp. 229–230 (Attorney General's Comments Annexed to Senate Report) and p. 413 (comments read into the Congressional Record as extension of remarks by members of the House of Representatives). See also *infra*, pp. 110–111.

[64] *American Stevedores* v. *Porello*, 330 U. S. 446, 452, points to the weight to be given to comments of the Attorney General on pending legislation when such communications are incorporated in congressional reports.

and the President to the exclusion of the judiciary; *second,* the two political branches do, and were intended to, extensively supervise petitioner's operations; *third,* prior to the 1950 amendment of the Canal Zone Code there was no judicial review of the President's rate determinations, and the 1950 legislation did not contemplate any change in this aspect of the machinery of prescribing the Canal tolls; and, *finally,* the statute requires presidential approval of any changes in the Canal tolls.

a. *The fact that the statute is concerned with the administration of United States property is indicative of an intent to preclude judicial review.* Respondents' claim is based upon Sections 411 and 412 of Title 2 of the Canal Zone Code (*supra,* pp. 3–6).[65] This legislation is concerned with the administration of, and the conditions under which the public may use, the Panama Canal, a most significant property of the United States. Sections 411 and 412 do not represent an exercise by Congress of its regulatory powers under Article I of the Constitution. The authority to enact them is derived from Article IV, Section 3, pursuant to which Congress has the power to make all needful rules and regulations respecting the property of the United States.

While there may be a strong presumption that Section 10 of the Administrative Procedure Act was designed to expand somewhat the availability or scope of judicial review in the case of administrative action

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[65] Complaint, par. 5 (R. 5); affidavit in support of motion for summary judgment, par. 3 (R. 13–15).

impinging upon the personal and property rights of individuals (*Heikkila* v. *Barber,* 345 U. S. 229, 232; *Shaughnessy* v. *Pedreiro,* 349 U. S. 48, 51), such considerations are less applicable in the area of the management of the public property. Here, as Representative Walter stated when explaining the Administrative Procedure Act on the floor of the House of Representatives, "the Government is in the position of an individual citizen and is concerned with its own property, funds, or contracts".[88] This concept has found expression in the opening clause of Section 4 of the Administrative Procedure Act (*infra,* p. 170) which exempts "any matter relating to * * *. public property" from the requirement of Section 4 (d) that "Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule".

This express provision gives clear guidance to the disposition of the present litigation. The gist of respondents' complaint is to compel petitioner to prescribe new tolls (R. 8), *i. e.,* to issue a "rule" as defined in Section 2 (c) of the Administrative Procedure Act (*infra,* p. 170). The withholding of the relatively weak privilege of "petition" in the area in which the Government deals "with its own property, funds, or contracts" is indicative of a congressional purpose to deny the far more potent remedy of judicial review. This part of Section 4 is a manifestation of the general principle that, where the Government is in the position of a private citizen, administrative action is normally

[88] 92 Cong. Rec. 5650; *Legislative History of the Administrative Procedure Act, supra,* fn. 61, p. 358.

subject to congressional and executive, not judicial, review.

The reason is that legislation, such as Sections 411 and 412, enacted pursuant to Art. IV, Section 3 of the Constitution, differs essentially from the more customary exercise by Congress of its regulatory authority. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 128. Statutes enacted under the former power are not considered to be "of a legislative character in the highest sense of the term (Art. 4, § 3) 'but savor somewhat of mere rules prescribed by an owner of property'." *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 474; *Butte City Water Co.* v. *Baker*, 196 U. S. 119, 126. In this area, Congress is considered to have the status not merely of a legislator but also that of a proprietor (*United States* v. *Midwest Oil Co., ibid.*; *Light* v. *United States*, 220 U. S. 523, 536), and Congress has the special constitutional function of disposing of, and administering, the property of the United States. *Alabama* v. *Texas*, 347 U. S. 272, 273; *United States* v. *San Francisco*, 310 U. S. 16, 29–30; *Light* v. *United States*, 220 U. S. at 537.

Any alleged illegality in the administration of Sections 411 and 412 of the Canal Zone Code thus is to be remedied by Congress, or by petitioner's administrative superiors under the "take care" clause of Art. II, Section 3 of the Constitution, not by the courts. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 130. As this Court held in *Lukens Steel Co.*, at pp. 127–128, "judicial restraint" upon the executive in this area "would constitute a break with settled judicial practice and a departure into fields hitherto

wisely and happily apportioned by the genius of our polity to the administration of another branch of Government".

b. *The stringent controls of the executive and legislative branches over the Panama Canal Company, and in particular its financial affairs, preclude judicial review.* The Panama Canal Company has in fact been subject to such stringent effective and current supervision by President and Congress, especially in the field of its financial affairs, as to negative the possibility of judicial review. Such review would either be redundant or would subject the petitioner to conflicting direction by the legislative and judicial branches.

Executive and legislative control over the affairs of the Panama Canal Company is derived essentially from two sources: Sections 246 (a) and 247 of the Canal Zone Code (*infra*, pp. 148–149, 151–152), and the Government Corporation Control Act. Under the former, all of petitioner's stock is held by the President, or his designee, the Secretary of the Army,[27] who appoints petitioner's directors to hold office at his pleasure. As this Court pointed out in *Humphrey's Executor* v. *United States*, 295 U. S. 602, 629, "one who holds office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will". The President thus has general and plenary supervisory powers over petitioner's affairs. Congress obviously expected him to exercise them. See also *infra*, pp. 61–70.

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[27] H. Doc. 160, 84th Cong., 1st Sess., p. 4 (R. 45, R. 171).

As for the financial affairs of the Panama Canal, presidential and congressional controls are even more detailed. Pursuant to Sections 102–104 of the Government Corporation Control Act (59 Stat. 598, 31 U. S. C. 847–849), petitioner[68] prepares an annual business-type budget which is submitted to the Bureau of the Budget, an establishment in the Executive Office of the President (31 U. S. C. 16). The President, who has the power to modify, amend, and revise this budget, transmits it to Congress which, in turn, considers it and passes the necessary legislation and appropriations. The purpose of these requirements and of the annual commercial type audit by the General Accounting Office (*supra*, p. 18, fn. 47) is expressed in Section 2 of the Government Corporation Control Act, 59 Stat. 597, 31 U. S. C. 841, *viz.*, "to bring Government corporations and their transactions and operations under annual scrutiny by the Congress and provide current financial control thereof". The statute thus entrusts *Congress and the President* with the current scrutiny of petitioner's financial affairs.

The congressional review of the petitioner's finances through the power of annual appropriations is exclusive, and precludes review of the same fiscal issues by the courts. In *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924, 931 (C. A. D. C.), certiorari denied, 350 U. S. 884, a case involving ac-

[68] As already noted, petitioner is subject to the Government Corporation Control Act. Cf. Section 101, 59 Stat. 597, as amended by the Act of September 26, 1950, § 2 (a), 64 Stat. 1038, 31 U. S. C. 846, *supra*, p. 11.

tivities over which "Congress had reserved for itself control * * * through the power of making annual appropriations for the executive departments affected", the court held that "The continuance of defendants' activities here complained of is therefore subject to review by Congress acting each year on the appropriations sought by the defendants. It is not—under the controlling precedents—subject to review by the courts". This ruling is merely a restatement of the holding of this Court in *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 130 (*supra*, pp. 48–49) that Congress' annual control over the financial and fiscal affairs of the Government makes judicial review in that area both unnecessary and undesirable.[39]

The injection of judicial review into the intricate field of the Government's fiscal legislation for the Panama Canal, moreover, would lead to confusion and possible conflict. Where Congress and courts agree, no harm would be done except a wasteful duplication of effort. In the case of disagreement, on the other hand, the courts and Congress may subject petitioner to conflicting directions, one enforceable by impeachment or removal, the other one by citation for contempt. Considerations of this type caused this Court to disclaim jurisdiction in *Mississippi* v. *Johnson*, 4 Wall. 475, 501.

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[39] "The power of Congress to make annual appropriations does not, of course, preclude judicial review of all of the activities of the executive. It is normally exclusive, however, in the financial and fiscal field, *i. e.*, the area under specific congressional scrutiny in connection with the appropriations acts.

The court below sought to refute this argument by proclaiming that the courts remain open "for the person unable to get redress from the busy legislature or White House" (R. 256).[70] However, the enactment of an appropriation act, approving a budget based on the present tolls, when Congress was advised of the controversial administrative fiscal action (see *infra*, pp. 136–138) indicates approval of the administrative action, not congressional inertia. *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535, 544–545, fn. 12; *Brooks* v. *Dewar*, 313 U. S. 354, 361; *Fleming* v. *Mohawk Co.*, 331 U. S. 111, 116, 119; *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 308–315. The silence of Congress may thus be just as meaningful as an express directive in an appropriation act. In such circumstances, an attempt by the courts to take jurisdiction because Congress failed to take action would amount to a judicial reexamination and possible overruling of a congressional ratification. Nor can it be said that the doctrine of ratification by appropriation is a convenient, but unrealistic, fiction with respect to fiscal matters. The reasoning of the court below implies that the Budget and Accounting Act of 1921 and the Government Corporation Control Act are failures, and that Congress is either

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[70] The court did not explain the source of its power to act. The President, of course, supervises the activities of his subordinates by virtue of the "take care" clause of Art. II, Section 3 of the Constitution. The congressional authority to scrutinize the fiscal affairs of the executive branch flows from its appropriation power (Art. I, Section 9, Clause 7 of the Constitution). The courts, however, do not have a general visitatorial power over the executive (see *infra*, pp. 72, 101).

unable or unwilling to perform its constitutional duty of controlling the financial transactions and operations of the executive branch. Such a breakdown of our political system cannot be readily assumed.

As a matter of fact, the very experience of the Panama Canal Company discloses that its fiscal affairs are subject to detailed and effective congressional scrutiny. The Conference Report on the Civil Functions Appropriations Bill, 1954 (H. Rept. 889, 83d Cong., 1st Sess., p. 10) contained directives to the Panama Canal Company to submit studies on the compensation paid workers in the Canal Zone, and on the *adequacy*—not the excessiveness—of the tolls charged vessels using the Canal. The study submitted in response to the latter directive may be found at 100 Cong. Rec. (Daily Ed.) A1995 (*infra*, pp. 173–179). When petitioner sought to abandon the Panama Railroad, Congress objected [71] and petitioner finally agreed to keep the railroad in operation.[72] Similarly, the congressional committees in charge of legislation and appropriations concerning the Panama Canal have been kept fully advised concerning the dispute at bar.[73]

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[71] H. Rept. 2076, 84th Cong., 2d Sess., p. 10; S. Rept. 2039, 84th Cong., 2d Sess., p. 7; H. (Conference) Rept. 2344, 84th Cong., 2d Sess., pp. 3, 6; H. Rept. 2974, 84th Cong., 2d Sess., p. 9.

[72] H. Doc. 210, 85th Cong., 1st Sess., pp. 28–29. For other instances of the detailed control exercised by Congress over petitioner, see H. Rept. 1345, 83d Cong., 2d Sess., p. 12; S. Rept. 1373, 83d Cong., 2d Sess., p. 26; H. Rept. 603, 84th Cong., 1st Sess., p. 10.

[73] For details, see *supra*, pp. 20–22, and *infra*, pp. 136–137.

c. *The 1950 amendment which did not expressly authorize judicial review was not designed to modify the pre-existing statutory plan under which judicial review was precluded.*

(*1*). Ordinarily, with respect to a regulatory statute, the mere failure expressly to provide for judicial review does not preclude review. *Stark* v. *Wickard*, 321 U. S. 288; *Heikkila* v. *Barber*, 345 U. S. 229, 233.[74] Sections 411 and 412 of the Canal Code, however, are not new and original legislation; nor do they deal with a regulatory problem. They constitute an amendment of the earlier provisions governing the determination of the Canal tolls. In these circumstances, the earlier availability of judicial review becomes highly material. And prior to 1950, the President alone was charged with the determination of the Canal tolls.[75] There is no question that his actions were not subject to judicial review. The 1950 amendments are silent on the issue of review. Against this background, "we cannot help but believe that if Congress had desired to implicate the federal judiciary and to place on the federal courts the burden of having the final say on any aspect of the problem, it would have made its desire plain". *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, at p. 303.

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[74] See also *Legislative History of the Administrative Procedure Act*, S. Doc. 248, 79th Cong., 2d Sess., p. 275. "The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review"; see also *id.* at p. 368.

[75] For the pre-1950 version of Sections 411 and 412, see 48 U. S. C. (1946 Ed.) 1315.

Moreover, none of the purposes sought to be accomplished by the 1950 amendment requires the injection of the judiciary into the problem of the Panama Canal tolls. The principal specific objectives of the 1950 legislation were (a) to streamline the administration of the Panama Canal, to put it on a businesslike basis; and (b) to avoid an increase of the Canal tolls to $1.40 per ton (*supra*, pp. 14–15). Neither of these purposes requires, implies, or is dependent upon the availability of judicial review, or a departure from the pre-existing statutory plan placing the Panama Canal, like most Government-owned property, under the exclusive control of the President and Congress.

The legislative history of the Act indicates that this, indeed, was the type of supervision anticipated by those who drafted the 1950 statute. Mr. Seidman, an official of the Bureau of the Budget, testified:

> * * * review and approval of the rate by the President is believed essential. The Congress will, of course, have an opportunity to examine tolls policy in connection with its review of the business-type budget to be submitted annually by the Company.[76]

Similarly, the debate on the floor of the House of Representatives discloses a congressional desire that "matters of policy will be controlled by the Congress through the annual budget submitted to the Congress under the Government Corporation Control Act of

[76] *Maintenance and Operation of the Panama Canal*, Hearings before a Subcommittee of the Committee on Armed Services, United States Senate, 81st Cong., 2d Sess. on H. R. 8677, p. 7 (R. 109).

1945" (96 Cong. Rec. 13372), and that "Congressional management of the entire undertaking will not be lessened in the slightest" (96 Cong. Rec. 13376). "Congressional management" would, of course, be lessened if the courts could independently review petitioner's rate determinations. It is clear that the 1950 Congress did not contemplate any such diminution of the plenary control by President and Congress.

(2). That petitioner may be sued is no indication of a congressional purpose to provide for judicial review where none existed before. Petitioner is a corporation and corporations are generally made suable. The waiver of sovereign immunity merely means that the courts have jurisdiction over the person of petitioner. Where the courts also have jurisdiction over the subject matter of the litigation, recovery is not to be defeated by petitioner's governmental nature or origin. Suability does not, however, confer upon the courts jurisdiction over the subject matter in areas in which Congress always has claimed to have the last word.

Nor can it be said that petitioner's incorporation on commercial lines, designed to operate like an ordinary business enterprise, reveals a legislative purpose to subject the determination of the Canal tolls to judicial review. In the first place, the premise of the argument—that Congress intended petitioner to have for all purposes the status of an ordinary commercial corporation—is fallacious. Petitioner is an agency and instrumentality of the United States; it is endowed with important aspects of the sovereignty of the United States, including priority in the payment

of debts out of bankrupt estates; and it is subject to budgetary restrictions under which no truly commercial enterprise could operate (Canal Zone Code, Title 2, Sections 245–249, *supra*, pp. 11–12, and *infra*, pp. 148–154, 164–166). This Court held, in 1937 in *New York ex rel. Rogers* v. *Graves*, 299 U. S. 401, 406–408, that the "creation, management and operation of the [Panama] canal are all governmental functions" and that the then Panama Railroad Company, petitioner's corporate predecessor, was a federal instrumentality engaged essentially in government business. At that time, the Panama Railroad Company was still a New York corporation, originally organized as a commercial enterprise, whose stock had been acquired by the Government. It was not then subject to the detailed surveillance of the Government Corporation Control Act, and it carried out solely the various supporting business operations (*supra*, pp. 9–10 and fn. 13). Since then, the Panama Railroad Company has been brought under the Government Corporation Control Act, it has been reincorporated under federal law, and renamed and charged with the "governmental function" (*supra*) of maintaining and operating the Canal. The reasoning supporting the 1937 holding of this Court that petitioner is a federal instrumentality, engaged essentially in Government business, has been much strengthened by this intervening legislation.

Moreover, the argument that Congress sought to subject petitioner's rate-making functions to judicial review because these activities are of a commercial, non-governmental nature, ignores the well-established rulings that, as far as the Federal Government is con-

cerned, all activities of validly created Government corporations are of a governmental nature. *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U. S. 95, 102; *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 477; *Inland Waterways Corp.* v. *Young*, 309 U. S. 517, 523–524. The circumstance that the Government engages directly, or through a Government corporation, in business activities analogous to those usually conducted by private enterprise does not mean that the Government agency or corporation may be treated exactly as if it were a private litigant. *Federal Crop Insurance Corp.* v. *Merrill*, 332 U. S. 380, 383–384. To assimilate Government activities of a business nature with those of private commercial enterprises, indifferent to the status of such organizations as primarily agencies and instrumentalities of the United States, necessarily construes the law "through the distorting lenses of inapplicable legal doctrine". Cf. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 144.

Actually, one prime inference to be drawn from the fact that the Government manages its property like a private individual is the very opposite of the conclusion reached by respondents and the court below. Such activities presumptively are subject to exclusive control by the political branches of the Government, and judicial review is precluded (*supra*, pp. 48–49). Except where some statute specifically provides for court scrutiny or the common law allows a reparation suit for past "unreasonable" utility rates (see *infra*, pp. 121–123; 140–143), prices charged by a private person are *not* normally subject to lowering

by a court, at the instance of a buyer, as out-of-line with proper pricing or cost requirements.

(3). The post-legislative history of Sections 411 and 412 of the Canal Zone Code likewise discloses congressional awareness that petitioner's toll determinations are not now subject to judicial review. In June 1955, a bill (S. 2167, 84th Cong., 1st Sess.) was introduced in the Senate which, among other things, would have amended Section 411 by conferring upon the Court of Appeals for the Second Circuit exclusive jurisdiction to review the acts of petitioner under that section, *i. e.*, the prescription of tolls and rules for the measurement of vessels, and to compel corporate action unlawfully withheld or unreasonably delayed.[77] The author of the bill (Senator Magnuson, 101 Cong. Rec. 7713) apparently felt it necessary specifically to provide for judicial review in the view that such scrutiny did not then exist. The Committee Report, presented by Senator Magnuson (S. Rep. 2375, 84th Cong., 2d Sess., p. 1), supports that inference. It concedes (at p. 23) that normally the fees and tolls charged by Government agencies are not reviewable by the courts. It felt, however, that petitioner's toll determinations were so closely linked with the public interest that they should be made subject to judicial review. The report pointed out that the proposed bill contained certain procedural elements designed to make judicial review technically possible, referring presumably to

[77] *Panama Canal (Changes in Administration)*, Hearings before the Subcommittee of the Committee on Interstate and Foreign Commerce, United States Senate, 84th Cong., 2d Sess. on S. 2167, p. 4.

the requirement that the toll hearing be conducted in accordance with the Administrative Procedure Act so as to avoid the criticism that judicial review would not be feasible in the absence of an administrative record.[78] The report added (at pp. 23–24) that its decision to provide for judicial review was decisively influenced by the fact that Mr. Chandler of the Administrative Office of the United States Courts had reviewed with Chief Judge Clark of the Court of Appeals for the Second Circuit the question whether petitioner's toll determinations could be made subject to judicial review and that Mr. Chandler had advised the committee that the court and his own office had "no objection to this portion of the legislation and believe that the question of an appeal procedure is one for the Congress to determine".[79]

While the committee reported favorably on S. 2167, the bill never came to a vote in the Senate,[80] and it died with the adjournment of the 84th Congress.

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[78] See, *e. g.*, *Panama Canal (Changes in Administration)*, *supra*, fn. 77, pp. 12–13.

[79] Mr. Chandler originally had advised the Committee that the provision "undertakes to give to a court functions which do not belong to it and which by its nature it is not adapted to perform effectively". *Panama Canal (Changes in Administration)*, *supra*, fn. 77, pp. 12, 13. See, in this connection, *Keller* v. *Potomac Electric Co.*, 261 U. S. 428; *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464, holding that a constitutional court such as the Court of Appeals for the Second Circuit cannot review discretionary rate determinations. Cf. *infra*, p. 75. For Mr. Chandler's later advice, see *Panama Canal (Changes in Administration)*, *supra*, at p. 173.

[80] 102 Cong. Rec. 11541, 12791, 13901. The discussion of the bill on the floor of the Senate at the time of its introduction indicates that there was considerable opposition to it. 101 Cong. Rec. 7742–7747.

d. *The requirement of presidential approval of the Canal tools precludes judicial review.* Another significant factor showing the exclusion of court review is the specific requirement of Section 411 that changes in rates of tolls shall be subject to, and take effect upon the approval of, the President of the United States, "whose action in such matter shall be final and conclusive". The procedure for change in tolls set out in Section 411 contains the following steps: first, petitioner determines that toll changes are required; second, petitioner gives six months' notice of the proposed changes by publication in the Federal Register; third, petitioner conducts a public hearing; and, fourth, the President approves changes in the tolls. The statute does not specify whether petitioner has the power to change its proposals on the basis of the hearing, or whether the President bases his action upon the petitioner's proposal, the record of the hearings, and such other factors (especially in the field of foreign relations and national transportation policy) as are known to him. If the latter interpretation of the statute is the correct one—if the evaluation of the post-proposal hearings is left completely to the President—petitioner's functions in the determination of the toll rates are of a minor and preliminary nature. We shall assume, however, that petitioner may modify the originally-proposed toll rates on the basis of the facts ascertained at the hearing, and submit those amended figures to the President for approval. In either case, petitioner's functions would be in the nature of advice to the President. And it is settled

that the courts neither review advice given to the President, nor compel an agency to give such advice.

(*1*). The reasons for the refusal of the courts to enter into an area of administrative action which is subject to presidential approval were re-examined several terms ago by this Court in *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U. S. 103. There, the Court held that those rulings of the Civil Aeronautics Board, an independent agency, which require presidential approval are not reviewable by the courts, despite the fact that the statute in general terms subjects all the decisions of that Board to judicial scrutiny. We submit that this result applies even more cogently to the activities of an agency in the executive branch of the Government,[81] where the statute does not even purport to make judicial review available.

Among the reasons for judicial non-interference in this area, as set forth in the *Waterman* case (333 U. S. at 112–114), are, first, that, prior to presidential approval, the administrative action does not grant any privilege or deny any right. Accordingly, it is not subject to judicial review because the latter presupposes "final" administrative action, *i. e.*, one which imposes an obligation, denies a right, or fixes some legal relationship.[82] The second ground is that the

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[81] *Morgan* v. *Tennessee Valley Authority*, 115 F. 2d 990, 993–994 (C. A. 6), certiorari denied, 312 U. S. 701, holds that the Tennessee Valley Authority, an agency charged with duties very similar to those of the Panama Canal Company, "is predominantly an administrative arm of the executive department".

[82] Cf. *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 131; Administrative Procedure Act, Section 10 (c), *infra*, p. 171.

federal courts lack jurisdiction to render decisions which may be overridden by the executive branch.[83] The decision also rests on the general reluctance of the courts to review administrative decisions involving prophesy, specialized knowledge, information and experience, particularly in the area of the foreign relations (333 U. S. at 111–112). Perhaps even more basic is the consideration that administrative action which requires presidential approval constitutes, in effect, advice to the President, and any judicial intrusion into the intimate relationship between the President and his advisors is a clear invasion of the executive domain. *Marbury* v. *Madison*, 1 Cranch 137, 166; *United States* v. *George S. Bush & Co.*, 310 U. S. 371, 379–380; *Employers' Group* v. *National War Labor Bd.*, 143 F. 2d 145, 151 (C. A. D. C.). Accordingly, it has been held that the requirement of presidential approval of agency action, in and of itself, leads to the preclusion of judicial review. *Updegraff* v. *Talbott*, 221 F. 2d 342, 346 (C. A. 4); see also *United States Overseas Airlines* v. *Civil Aeronautics Board*, 222 F. 2d 303, 304 (C. A. D. C.).

(2). The court below sought to distinguish these principles on two grounds. First, it took the position that petitioner's refusal to change the tolls finally denied respondents' right to lower tolls,[84] and consti-

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[83] *Hayburn's Case*, 2 Dall. 409; *United States* v. *Ferreira*, 13 How. 40, 49–51; *Gordon* v. *United States*, 117 U. S. 697.

[84] See pp. 126–129, *infra*, on the question of whether respondents have a "right" to have tolls computed according to the toll formula of Section 412.

tuted final agency action; second, it claimed that the President played a very minor role in approving the tolls recommended by petitioner. In our view, there is no merit to either argument.

(*i*). Petitioner's failure to propose new tolls is not final. The Canal Company's directors serve at the pleasure of the President's designee, the Secretary of the Army. The President is well able to direct petitioner to propose new tolls, to give notice thereof, and to conduct a hearing, if he thinks that petitioner is duty bound to do so (*supra*, p. 49). The ultimate responsibility rests in the President, and it is not the province of the courts to force upon him advice which he does not desire.

The courts, consequently, have refused, not only to review administrative action which is in the nature of advice to the President, but also to compel an executive officer to give advice to the President.[80] In *Yelvington* v. *Presidential Pardon & Parole Attorneys*, 211 F. 2d 642 (C. A. D. C.), the court declined to direct the Pardon Attorney in the Department of Justice to submit a petition for clemency to the President. It held (at pp. 643–644):

> Failure of a subordinate to obey his superior's directions in matters of this sort is ordinarily a matter of internal supervision and discipline. Seldom, if ever, would a court serve a useful purpose by issuing mandamus to a subordinate official to report to a superior or send a

[80] Cf. p. 62, fn. 81. The problem may be different where an independent agency, not subject to the President's control, withholds or delays action.

> particular document to him. * * * Other and more practical remedies are usually available.
>
> * * * * * *
>
> If they [the officials] have erred, he [the President] may correct them. But we do not think we should attempt to do so.

Updegraff v. *Talbott*, 221 F. 2d 342, 344, 346 (C. A. 4), similarly refused to compel the Secretary of the Air Force to lay certain records before the President for action.

(*ii*). The second argument—that the President's role in approving new tolls is so negligible that it may be disregarded—is not borne out by the facts. Authority to propose new tolls and to initiate rate proceedings was given in 1950 to the Panama Canal Company, not in order to deprive the President of his functions and final responsibility, but to provide him with a body of trained advisors. It was prompted by the discovery that the Army was not equipped with staff facilities having the background required in the area of the technical and policy aspects of determining Canal tolls. But, at the same time, the President's role and authority were confirmed.

The 1950 Act goes back to the President's Proclamation No. 2775 of March 26, 1948, 62 Stat. 1494, which sought to raise the Canal tolls to $1.00 (*supra*, pp. 13–14). House Report No. 1304, 81st Cong., 1st Sess., following an investigation of this attempt, recommended (p. 7) that the President be requested to have a study made of the organization of the Panama Canal, and that Proclamation No. 2775 be suspended until a decision could be reached as to the

final organization of the Canal. The report pointed out (p. 4) that the recommendation to raise the Canal tolls had gone exclusively through Army channels, that there had been no consultation by the Army with any qualified rate-making authority, and that the record did not contain any expert testimony justifying the proposed increase in the tolls.

The study of the Bureau of the Budget, prepared in response to House Report No. 1304, stressed that the Department of the Army was not qualified to deal with policy issues such as are here involved (H. Doc. 460, 81st Cong., 2d Sess., p. 11, R. 95). But the study also explained that the determination of the Canal tolls involved not only technical rate-making problems, which indeed could be left to the Company's board of directors (p. 16, R. 102), but also policy questions because "[a]ctions taken by the Canal may vitally affect not only world trade and shipping but also intercoastal trade and transcontinental railroads" (p. 11, R. 95). It concluded that "review and approval of the rate by the President is essential" in view of these policy questions, especially in the field of national transportation policy (p. 16, R. 102). Again, during the hearings before the Committees of both Houses of Congress, Mr. Seidman of the Bureau of the Budget explained that the technical rate-making functions could be delegated to the Company's Board of Directors. He added, however:

> There are two important safeguards provided in the bill. The first is the requirement for a public hearing and the second for Presidential approval. *Since tolls may have an ef-*

> *fect on national transportation policy, review and approval of the rate by the President is believed essential.* [Emphasis added.][86]

The House hearings also disclosed the potential impact of toll rates on foreign policy and treaty obligations.[87]

In short, the purpose of presidential approval of the rates is not to see whether the figures computed by petitioner comply with the statutory formula, but to determine whether policy reasons require a departure from that formula or some modification in the weight to be attached to various factors. The President was not to be a supervising cost-accountant. He was to act as President of the United States. And it is surely not a matter of conjecture that the President might well exercise his presidential powers and duties to reexamine and modify toll rates proposed by petitioner. The tolls charged by the Canal have significant effects in the fields of national transportation policy and of foreign relations. Changes in those rates, in particular a reduction of the magnitude claimed by respondents[88] could not fail to have a wide reach, touching upon several of the areas with which the President is directly concerned.

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[86] *Maintenance and Operation of the Panama Canal*, Hearing before a Subcommittee of the Committee on Armed Services, United States Senate, 81st Cong., 2d Sess., on H. R. 8677, September 1, 1950, p. 7 (R. 109). To the same effect, *Authorization and Provision for the Maintenance and Operation of the Panama Canal, etc.*, Hearings before the Subcommittee on the Panama Canal of the Committee on Merchant Marine and Fisheries, House of Representatives, 81st Cong., 2d Sess. on H. R. 8677, p. 46.

[87] See House Hearings, *supra*, fn. 86, pp. 43, 85–86.

[88] *Viz.*, a reduction of 26½ per centum or 24¢ (R. 33).

For example, the transcontinental freight rates of the railroads, from their very inception, have been kept on a low basis in order to meet water competition. *St. Louis & O'Fallon R. Co.* v. *United States*, 279 U. S. 461, 512–513 (dissenting opinion of Brandeis, J.); *Forrestal* v. *Abilene & S. Ry. Co.*, 263 I. C. C. 457, 469; *Class Rates, Mountain-Pacific Territory*, 296 I. C. C. 555, 566. Indeed, there has been indication to the effect that as the result of this competition transcontinental railroad freight rates have been depressed to such an extent that they "do not afford a fair standard of reasonableness". *War Materials Reparation Cases*, 294 I. C. C. 5, 70–71; see also *id.* at 64; *Transcontinental Rail Rates*, 268 I. C. C. 567, 571. Respondents demand that the Canal tolls be reduced 26½ per centum, or 24¢ per ton (R. 33). This substantial decrease would enable the steamship lines considerably to lower their rates. The railroads would be confronted with the choice of either losing a sizeable portion of their long-haul business or of lowering their own rates. In view of the present financial difficulties of the railroads, the question would arise whether such a result would be in accord with the national transportation policy expressed in Section 1 of the Transportation Act of 1940, 54 Stat. 899, 49 U. S. C., Ch. 1, note.

With respect to world trade and foreign relations, the effects of a decrease in the Canal tolls of such magnitude can hardly be accurately forecast by a court. The results may be beneficial; they also may be disturbing. Prophecy in this area is not in the province of judicial or forensic determination (cf.

Chicago & Southern Air Lines v. *Waterman Steamship Corporation*, 333 U. S. 103, 111). We shall point to only one of many potentialities. The Panama and Suez Canals compete for the trade of a large portion of the Far East and Australia. The reduction of the Panama tolls by 24¢ thus may divert a considerable amount of trade from the Suez Canal. Whether that is wise and appropriate in the present state of affairs must be left to the President. Similarly, the President is the one to take account of the possible effect on national defense, or on Central and South American relations, of a lowering of the tolls which might diminish supporting Canal Company functions in that region, overcrowd the Canal, burden its maintenance, increase its costs, or, conversely, perhaps add to its effectiveness.

In any event, it cannot be said, as did the court below, that "in the normal situation tolls would be set by the defendant [petitioner] and approved by the President * * *" and that the occasional intervention by the President amounts to a "mere possibility" (R. 253). Presidential approval of the toll rates constitutes an integral and "essential" part of the statutory plan. It may not be disregarded, and, as we have shown, a presidential veto of lowered rates is a definite possibility. The requirement of presidential approval indicates that petitioner's prescribing of new tolls does not constitute final agency action, but merely an internal, preliminary, administrative step in the nature of advice to the President, which the President may heed, modify, or ignore. This statutory plan—with the President made the focal

point—indicates once again that Congress sought to preclude judicial review of petitioner's rate determinations.

To sum up: judicial review has been precluded, within the meaning of Section 10 of the Administrative Procedure Act, because the statute relates to the management of the Government's own property, the Panama Canal; because of the complete control of petitioner's activities by the President and Congress; because the 1950 statute did not aim to make reviewable action which previously had not been reviewable; and, finally, because the overriding requirement of presidential action indicates that petitioner's action is a nonreviewable internal administrative step.

B. THE DISTRICT COURT LACKS JURISDICTION TO GRANT THE RELIEF RESPONDENTS DEMAND BECAUSE THEY SEEK TO COMPEL AGENCY ACTION COMMITTED TO AGENCY DISCRETION, AND BECAUSE, IN ANY EVENT, IT LACKS JURISDICTION TO GRANT RELIEF OF A MANDATORY NATURE.

In Subpoint A of Point I (*supra*, pp. 44–70), we have shown that judicial review of petitioner's administration of the Panama Canal tolls has been precluded by statute. Here, we shall demonstrate that the courts likewise lack jurisdiction to award the relief sought by respondents because the petitioner's toll-determining function constitutes a discretionary, non-

ministerial, power.[59] Moreover, the relief sought is of a mandatory nature, and it is well established that the only federal courts vested with this type of jurisdiction are those located in the District of Columbia. For these two reasons, our position is that, even if judicial review of petitioner's toll-determining functions is not wholly precluded (as we urge in Subpoint A), the District Court below cannot order petitioner to take action to lower the tolls, as respondents would have it do.

1. *The courts lack jurisdiction to compel petitioner to prescribe new tolls because that function is discretionary and non-ministerial.*

a. *Judicial jurisdiction to compel official action is limited to instances in which the enforcement of ministerial duties is sought.* According to Section 10 of the Administrative Procedure Act, *supra*, p. 6, judicial review cannot be had to the extent that agency action is by law committed to agency discretion. This proviso incorporates the rule going back to *Marbury* v. *Madison*, 1 Cranch 137, 166, and *Decatur* v. *Paulding*, 14 Pet. 497, 514–517, that the power of the courts to *compel* official action, *i. e.*, their mandamus jurisdiction, is normally limited to the enforcement of non-discretionary ministerial duties.

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[59] Section 10 of the Administrative Procedure Act, *supra*, p. 6, does not authorize judicial review "so far as (1) statutes preclude judicial review *or* (2) agency action is by law committed to agency discretion." (Emphasis added.) In Subpoint A, *supra*, we have discussed the first branch of this exception; in this part, Subpoint B, we discuss the second branch.

This distinction between discretionary and ministerial duties is a corollary of the doctrine of the separation of powers upon which our Constitution rests. Chief Justices Marshall and Taney stressed in *Marbury* v. *Madison* and *Decatur* v. *Paulding* that the courts are coordinate with, not superior to, the executive branch; they have no general supervisory power over the manner in which administrative officials perform their duties requiring the exercise of judgment and discretion. Consequently, the affirmative intervention of judicial power *to compel action* is ordinarily limited to those instances where an official fails to comply with an absolute statutory duty, *i. e.*, where he fails to perform a ministerial act.[10] *Marbury* v. *Madison, supra*, at 166; *Decatur* v. *Paulding, supra*, at 515; *Work* v. *Rives*, 267 U. S. 175, 177; *Wilbur* v. *United States*, 281 U. S. 206, 218–219; *United States ex rel. Girard Trust Co.* v. *Helvering*, 301 U. S. 540, 543. An official act is ministerial "[w]here the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command * * *". *Wilbur* v. *United States*, 281 U. S. 206, 218; see also *United States* v. *Wilbur*, 283 U. S. 414, 420; *Interstate Commerce Commission* v. *New*

[10] Where it has been determined that the duty is of a discretionary nature, the courts lack jurisdiction. *Marbury* v. *Madison*, 1 Cranch 137, 170; *United States ex rel. Goodrich* v. *Guthrie*, 17 How. 284, 304; *Litchfield* v. *Register and Receiver*, 9 Wall. 575, 577; *United States ex rel. Tucker* v. *Seaman*, 17 How. 225, 230; *United States ex rel. Dunlap* v. *Black*, 128 U. S. 40, 48; *Work* v. *Rives*, 267 U. S. 175, 177. On the relationship of these considerations to the standing problem, see *infra*, p. 101.

York, N. H. & H. R. Co., 287 U. S. 178, 203, 204; *United States ex rel. Girard Trust Co.* v. *Helvering*, 301 U. S. 540, 543.

That the scope of a duty depends upon the interpretation of a statute does not automatically render a duty "ministerial." The interpretation of a statute frequently is included among the duties involving judgment and discretion entrusted to an official, *Decatur* v. *Paulding*, 14 Pet. 497, 515. The interpretation of "a statute or statutes the construction or application of which is not free from doubt * * * is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus", *Wilbur* v. *United States*, 281 U. S. 206, 219, and the authorities there cited. In particular, the construction of a statute *by the agency entrusted with its administration* is a "discretionary" matter, reviewable in mandamus proceedings only if it is "clearly erroneous" and the matter is "peradventure clear,"[91] or, in other words, if it does not require the gathering of its purport "by doubtful inference from statutes of uncertain meaning". *Interstate Commerce Commission* v. *New York, N. H. & H. R. Co.*, 287 U. S. 178, 203–204. In this respect, executive agencies are not "mere fact-finding bodies", *Gray* v. *Powell*, 314 U. S. 402, 412. Conversely, judicial review in the nature of mandamus cannot be made

[91] *United States ex rel. Chicago Great Western R. R. Co.* v. *Interstate Commerce Commission*, 294 U. S. 50, 63.

to perform the function of a writ of error.[92] These considerations are all accentuated where the plaintiffs, as respondents do here, merely assert that the administrative decision was incorrect, not that the officials acted outside the scope of their authority. *Joint Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 156–157 (concurring opinion).

b. *Rate determinations, such as determinations of the Canal tolls, are primarily discretionary.* (*1*). In *Board of Trade of Kansas City* v. *United States*, 314 U. S. 534, 546, this Court explained that the

> * * * process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. * * *

Again, *New York* v. *United States*, 331 U. S. 284, 335, stresses that the

> * * * problems of transportation economics are complicated and involved. For example, the determination of transportation costs and their allocation among various types of traffic is not a mere mathematical exercise. Like other problems in cost accounting, it involves the exercise of judgment born of intimate knowledge of the particular activity and the making of adjustments and qualifications too subtle for the uninitiated. * * *

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[92] *Commissioner of Patents* v. *Whiteley*, 4 Wall. 522, 534; *Interstate Commerce Commission* v. *Waste Merchants Association*, 260 U. S. 32, 34; *Work* v. *Rives*, 267 U. S. 175, 183, and the authorities there cited; *Interstate Commerce Commission* v. *United States ex rel. Campbell*, 289 U. S. 385, 394; and see *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 144.

Rate determinations fall into the area of decisions which are delicate, complex, and involve a large amount of prophecy, specialized knowledge, information and experience; they rest upon considerations not entirely susceptible of strict proof or disproof. The courts have neither the "aptitude, facilities nor responsibility" to re-examine *de novo* such issues which essentially raise problems entrusted to executive or administrative judgment and discretion. *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U. S. 103, 111; see also *Chicago, B. & Q. Ry. Co.* v. *Babcock*, 204 U. S. 585, 598; *Williamsport Wire Rope Company* v. *United States*, 277 U. S. 551, 559, 561; *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 303; *Stark* v. *Wickard*, 321 U. S. 288, 310.

This Court, accordingly, has held that constitutional courts, such as the courts below and this Court, cannot review the legislative discretion inherent in the process of rate determination as a whole. *Keller* v. *Potomac Elec. Co.*, 261 U. S. 428, 440–444; see, also, *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464, 467–469. At most, Congress confers upon the courts the power to review specific questions of law and to overturn findings of fact which are arbitrary or capricious, or not supported by substantial evidence (*Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266, 275–276, see also Administrative Procedure Act, Section 10 (e), *infra*, p. 172). The range of discretion rests with the ratemaking agency.

(*2*). Congress has certainly not expanded these

principles of judicial review with respect to the process of prescribing tolls for the Panama Canal. To the contrary, it has indicated—by the deliberate use of permissive, discretionary, language—that toll determinations are entrusted to the discretion of petitioner and the President. Pursuant to Section 411, petitioner "is *authorized* [not directed] to prescribe and from time to time change * * * the tolls that shall be levied for the use of the Panama Canal * * *." (Emphasis added.) On the other hand, an examination of the Act of September 26, 1950 (64 Stat. 1038, *infra*, pp. 159–169), which cast Sections 411 and 412 of the Canal Zone Code into their present form, discloses that Congress repeatedly and deliberately used mandatory language when it intended to impose a binding duty upon petitioner. Section 3 of the Act, amending Title 2, Section 10 of the Canal Zone Code, *infra*, pp. 160–163, twice uses the terms "the Panama Canal Company shall promptly adjust and pay". Sections 6 and 7, amending Title 2, Section 246 of the Canal Zone Code *infra*, pp. 164–165, use terms such as "the corporation shall pay," and "the corporation is further obligated". Even Sections 11 and 12 (*infra*, pp. 167–169), amending Sections 411 and 412 of the Canal Zone Code—the very provisions here involved—in other contexts repeatedly use the term "shall" in the mandatory sense.

The Act of June 29, 1948, 62 Stat. 1075, incorporating the Panama Railroad Company (*supra*, pp. 147–157), which, as an earlier amendment to the Canal Zone Code, is *in pari materia* with the 1950 statute, also

contains language which is mandatory on its face. Sections 245 and 246, as added by Section 2 (*infra*, pp. 148–151), repeatedly use the term "shall" in a directive sense; in Section 251 (*infra*, p. 155), the corporation is "authorized and directed" to take over the assets of the old New York corporation; Section 253 (*infra*, p. 156), imposes upon the board of directors "the power and duty". In view of this use of unambiguously mandatory language, especially the combination "authorize and direct", the selection of the term "authize" in Section 411 of the Code discloses that Congress sought to grant petitioner permissive, discretionary, powers in the area of computing the Canal tolls. *United States* v. *Wilbur*, 283 U. S. 414, 417–418.

The antecedent Panama Canal legislation confirms that the word "authorized" in Section 411 (as added in 1950) was not intended to imply a mandatory duty. This language is identical with that used in Section 5 of the 1912 Act (*supra*, p. 12) pursuant to which the President was "authorized to prescribe and from time to time change" the Canal tolls. Prior to 1950, the President's power to prescribe canal tolls obviously was not subject to judicial review. If Congress had intended that petitioner's toll fixing activities were to be considered a ministerial duty, enforceable not only by the right to petition the President and Congress but also by judicial decree, it would not have continued to use statutory language, including the term "authorize", which carried with it a long history of discretionary authority and preclusion of judicial review. See, also, *supra*, pp. 54–56, 66–70.

c. *Petitioner has not violated any ministerial duty.* Assuming *arguendo* that the courts have jurisdiction to review the violation by petitioner of a ministerial duty in the process of toll determination, it is apparent that none of respondents' specific charges involves duties of a ministerial nature. Briefly, respondents, in adopting the Comptroller General's theory (*supra*, pp. 18–20, 22–23), complain (i) that petitioner did not allocate an appropriate share of the cost of the Canal Zone Government and of the corporate overhead to the cost of operating the Panama Canal—specifically, that the share allocated was too high and that, if petitioner had performed its statutory duty, the tolls of the Canal would have to be lowered by about 25% (*supra*, pp. 66–69; R. 33); (ii) that the deficit in the operations of the supporting activities brought about by the proper allocation of the cost of the Canal Zone Government (and of the overhead) should have been made up by an increase in the prices charged by those activities; and (iii) that this deficit does not constitute an element of the "costs of maintaining and operating the Panama Canal together with the facilities and appurtenances related thereto" which are recoverable by tolls.

(*1*). In the first place, this case does not involve the situation in which an agency has arbitrarily refused to act although it is required to do so, and in which the court may direct it to act, without assuming to control or guide the exercise of its authority. Cf. *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515, 551; *Interstate Commerce Commission* v. *Humboldt S. S. Co.*, 224 U. S. 474, 485. Petitioner's refusal to lower the Canal rates is not based

upon a failure to take any action at all, but upon its continuous observation and evaluation of the pertinent data and of its reasoned determination that, according to its interpretation of the facts and the law, a change in the toll rate is neither indicated nor necessary. 100 Cong. Rec. (Daily Ed.) A1995 *supra*, pp. 17–18; *infra*, pp. 173–176.[93] Respondents thus seek, in reality, an order compelling petitioner to repeat an act already performed and to reverse its earlier decision. This, however, cannot be done unless the duty is of a ministerial nature. *United States ex rel. Dunlap* v. *Black*, 128 U. S. 40, 48; *Wilbur* v. *United States*, 281 U. S. 206, 218; *Interstate Commerce Commission* v. *United States ex rel. Campbell*, 289 U. S. 385, 393–394.

(2). The particular issues as to which respondents challenge petitioner's views, on their face, do not involve the simple, peremptory, and ministerial type of duty which the courts have the power to enforce by mandatory decree. Indeed, the court below admitted as much when it held that petitioner's conceptions of its statutory duties "are reasonable from the naked words" of the statute (R. 245), and then based its determination that petitioner had violated its duty on an extensive discussion of the complicated legislative history of the 1950 statute and of the purposes it supposedly was designed to accomplish

[93] See also *Changes in the Administration of the Panama Canal Company*, Hearings before the Subcommittee on Panama Canal of the Committee on Merchant Marine and Fisheries, House of Representatives, 84th Cong., 1st Sess., on H. R. 6917, etc., p. 163. *Panama Canal (Changes in Administration)*, Hearings before the Subcommittee of the Committee on Interstate and Foreign Commerce, United States Senate, 84th Cong., 2d Sess., on S. 2167, p. 94.

(R. 245–249). Significantly, the analysis of the same materials by the District Court came to the opposite result (R. 219–225). As this Court held in *United States* v. *Wilbur*, 283 U. S. 414, 419, the courts will not re-examine on mandamus an administrative interpretation of a statute supported by its "words"; in any event, in the present situation, petitioner's alleged duty to lower the rates cannot be said to be "clear and indisputable", *ibid.* at 420.

The first of the particular fiscal questions involves the process of determining what constitutes an "appropriate share of the net costs of operation of the Canal Zone Government", giving "substantial weight * * * to the ratio of estimated gross revenues from tolls to the estimated gross revenues of the said corporation". This language, using terms such as "appropriate share" and "substantial weight", shows that the distribution of the cost of the Canal Zone Government between the Canal operation proper and the remaining supporting activities is discretionary. As the Court stressed in *New York* v. *United States*, 331 U. S. 284, 335 (*supra*, p. 74), such cost allocations do not constitute "a mere mathematical exercise" but require the exercise of judgment. Even S. Rept. 2375, 84th Cong., 2d Sess., which on the whole is critical of petitioner, agrees (at p. 24) that under Section 412 (b) of the Canal Zone Code "the proportionate revenues" are not "the sole factor in dividing the Zone Government costs".

The reason for petitioner's refusal to apportion the cost of the Canal Zone Government (and of the corporate overhead) strictly according to the proportion-

ate revenues, and to allocate it to its several activities, is that such a procedure would create accounting deficits in its individual activities, and such deficits would have to be made up or erased in some way. This consideration is, as the Comptroller General himself concedes, in accordance with generally accepted accounting practices.[94] Petitioner's position on this score has been repeatedly explained to Congress.[95] Managerial and fiscal judgment of this type does not constitute a ministerial function which the courts can compel an agency to perform according to some fixed concepts of the proper rule to be applied. Our basic position, to reiterate, is that petitioner's allocation of the cost of the Canal Zone Government and of the

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[94] Comptroller General's Report for 1956, H. Doc. 210, 85th Cong., 2d Sess., p. 16. For the underlying accounting considerations, see petitioner's statement in *Panama Canal (Changes in Administration)*, *supra*, fn. 93, p. 69: "What constitutes an appropriate share of general corporate charges to be recovered on sales of supporting services is a matter of management judgment in each case. The experience of private industry clearly demonstrates that the proper assessment of such costs cannot be satisfactorily determined by the application of rigid cost allocation formulas which would prorate overheads uniformly over canal customers, employees, and other users of supporting services alike. In most cases the pro rata allocation of general corporate charges to each supporting activity would dictate unreasonable or prohibitive prices. The pricing objectives that will produce the greatest total benefit is that which will produce the maximum operating income before general corporate expense."

[95] See, *e. g.*, *Study of the Operations of the Panama Canal Company and Canal Zone Government*, Hearings before the Committee on Merchant Marine and Fisheries, House of Representatives, 84th Cong., 1st Sess., March 29–31, 1955, pp. 17–18, 21, 103 and the documents referred to *supra*, p. 20, fn. 47. See also *infra*, pp. 136–138.

corporate overhead constitutes a function entrusted to petitioner's judgment.[26] And if petitioner determines that according to its allocation figures the toll formula does not warrant a change in tolls, it is not the province of the courts to correct those figures or make a substitute allocation.

(3). Assuming, however, that petitioner was under a duty to divide the cost of operating the Canal Zone Government so as to lower substantially the share allocated to the Canal operations and to create a deficit in the business operations, the question still arises whether in those circumstances petitioner was subject to the ministerial duty to lower the Canal rates. Petitioner's position is that this deficit of the business activities constitutes part of the costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto, which the tolls (according to Section 412 (b), *supra*, pp. 4–5) should cover. Respondents object to this interpretation of the toll formula and claim that, in any event, petitioner was duty bound to avoid this deficit by raising the prices charged by the supporting facilities rather than by maintaining the tolls at their present level.

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[26] The complexity of the financial problems involved appears from the Comptroller General's report itself. Of the costs of the Canal Zone Government, the 1954 Report (p. 13, R. 54) allocated to the Canal operations 65% in 1954, 63% in 1953 and 55% in 1952. It pointed out that, if the allocation had been based upon the ratio of gross investment, rather than gross revenue, the supporting business activities' share in the cost of the Canal Zone Government would have amounted to only 22%.

Petitioner's answer to this latter contention is that, as a matter of business judgment, it is not feasible to increase those prices to the extent that they would absorb an "appropriate share" of the Canal Zone Government. The customers of the supporting facilities fall into two groups: (a) employees of petitioner itself and of the Canal Zone Government and (b) the Canal users. For the former, relatively low prices in the commissaries and similar establishments constitute customary fringe benefits. Substantial price increases would merely result in raises of salaries, *i. e.*, a general increase of the cost of operations.[37] On the other hand, if the costs to the Canal users for services such as dry-docking and repairs would be increased substantially, they would take their business elsewhere.[38] Any attempt to burden the supporting activities with the annual $5,000,000 deficit computed by the Comptroller General (R. 43, 53) thus would price them out of business. Congress has been advised of

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[37] Cf. the Comptroller General's Report for 1954, H. Doc. 160, 84th Cong., 1st Sess., pp. 14–16, R. 56–58. Comptroller General's Report for 1956, H. Doc. 210, 85th Cong., 1st Sess., pp. 19, 69. Respondents' own spokesmen conceded that "it is not general business practice for American corporations operating in foreign countries to charge their employes with the full cost of furnishing such goods and services in a foreign land." *Changes in the Administration of the Panama Canal Company*, Hearings before the Subcommittee on Panama Canal of the Committee on Merchant Marine and Fisheries, House of Representatives, 84th Cong., 1st Sess. on H. R. 6917, etc., December 5, 1955, p. 23.

[38] At the hearings referred to in the preceding footnote, respondents' spokesman admitted that respondents benefited to a large extent from this pricing policy. *Ibid.*, pp. 24–29.

this,[9] and the Comptroller General's Report for 1956 concedes that it is economically impracticable to raise rates and prices so as to recover all the costs which, according to his theories, should be allocated to the supporting activities.[1]

Petitioner's determination that the prices charged by the supporting business activities cannot be raised—if an appropriate share of the Canal Zone Government and of the corporate overhead has to be charged to them—so as to avoid a deficit in their operations, is thus supported by the exercise of sound business judgment. This is the very type of issue which has traditionally been considered outside the realm of the judicial branch.

(*4*). We finally reach the legal question of whether a deficit in the operation of the supporting business activities constitutes an element of the "costs of maintaining and operating the Panama Canal together with the facilities and appurtenances related thereto" within the meaning of Section 412, and therefore recoverable through tolls, or whether the Comptroller General and respondents are correct in insisting that such losses can be recovered only through special appropriations, *i. e.*, at the expense of the federal taxpayer. We submit that the former alternative represents the correct interpretation of the statute.

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[9] *Study of the Operations of the Panama Canal Company and Canal Zone Government*, Hearings before the Committee on Merchant Marine and Fisheries, House of Representatives, 84th Cong., 1st Sess., March 29, 30, and 31, 1955, pp. 17–18, 103.

[1] H. Doc. 210, 85th Cong., 1st Sess., pp. 19–20, see also p. 7. For a résumé of petitioner's position, see *ibid.*, pp. 68–69.

and, in any event, that it is not so "clearly erroneous" as to be reviewable on mandamus (*cf. supra*, pp. 73–74).

As a matter of language, the statutory words "facilities and appurtenances related thereto", *i. e.*, to the Panama Canal operations, necessarily refer to petitioner's business activities, most of which formerly had been carried out by the Panama Railroad Company (*supra*, pp. 9–10). "Facilities and appurtenances" are words of art in the Canal Zone Code. Only a year prior to the 1950 amendment, Section 2 of the Act of August 12, 1949, amending Canal Zone Code, Title 2, Sections 51 and 52 (*infra*, pp. 157–159), described as "facilities and appurtenances" of the Panama Canal such supporting business activities as docks, wharves, piers, drydocks, salvage and towing facilities, marine railways, warehouses, hotels and restaurants, and, in general, sales, and such establishments as render sales and services to vessels using the Canal, and to employees of the Canal Zone Government and the Panama Railroad Company. This statutory definition of the supporting business activities as "facilities and appurtenances" restates the holding of this Court in *New York ex rel. Rogers* v. *Graves*, 299 U. S. 401, 403–404, 406, that the business activities of the former Panama Railroad Company constituted "auxiliaries primarily designed and used to aid in its [the Canal's] management and operation." Accordingly, as a matter of statutory language, the term "costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto," as used in Section

412, includes any deficit suffered in the operation of the supporting business activities.

The same result flows from the general statutory plan and the purpose Congress sought to accomplish by the enactment of the 1950 amendment to the Canal Zone Code. The alleged bookkeeping deficit of the supporting business activities has been created by the rigid allocation to them of a pro rata share in the cost of the operation of the Canal Zone Government (cf. *supra*, pp. 78–82). If respondents and the court below are correct, this deficit, representing a part of the cost of operating the Canal Zone Government, would have to be paid out of appropriated funds, not out of the Canal revenues. Such a result, however, would be in direct conflict with the Canal Zone Code, Title 2, Section 246 (e) (*infra*, p. 165), also part of the 1950 legislation, which declares expressly that "the net costs of operation of the Canal Zone Government, which are deemed to form an integral part of the costs of operation of the Panama Canal enterprise as a whole * * *". In other words, under the statute, the costs of the Canal Zone Government must be recovered through tolls if the profits of the supporting business activities are unable to pay for them.

The notion that a part of the cost of the Canal Zone Government would not be paid out of petitioner's revenues, that the Canal tolls would be lowered correspondingly, and that Congress would appropriate several million dollars a year in order to finance such a subsidy to the Canal users—two-thirds of which are of foreign registry (*supra*, pp. 19–20)—is, of course,

diametrically opposed to the objectives the 1950 amendment was designed to accomplish. Two ideas pervade the legislative history of that statute, first, that the new statutory plan would not cost the Government any money, *i. e.*, that petitioner would be financially self-sufficient; and, second, that under the new formula the tolls would rise from 90¢ to 95¢, or even $1.00. During the hearings before the Senate Committee on Armed Services, Senator Byrd stated:

> * * * for the purpose of the record, I want to show that the passage of this bill is estimated to bring in new revenue of 5 cents a ton on 28,000,000 tons which would be about $1,400,000 of new revenue. We will not lose any revenue.[2]

Similarly, it was pointed out repeatedly on the floor of the House of Representatives that the new legislation did "not carry added cost to the Government",[3] and that the toll charges at cost under the terms of the bill would amount to 95¢.[4] If the statute imposed

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[2] *Miscellaneous Bills*, Hearing before the Committee on Armed Services, United States Senate, 81st Cong., 2d Sess., on S. 2222, etc., September 7, 1950, p. 22, see also pp. 16, 17, 18, 19. To the same effect, *Maintenance and Operation of the Panama Canal*, Hearing before a Subcommittee of the Committee on Armed Services, United States Senate, 81st Cong., 2d Sess., on H. R. 8677, September 1, 1950, p. 18 (R. 128); S. Rept. 2531, 81st Cong., 2d Sess., p. 5 (R. 165).

[3] Representative O'Toole, the author of the pertinent House Report 2935, 81st Cong., 2d Sess., at 96 Cong. Rec. 13372; Rep. Fugate: 96 Cong. Rec. 13373; Rep. Miller: 96 Cong. Rec. 13375.

[4] Rep. Miller at 96 Cong. Rec. 13375; for additional references see the opinion of the district court, fn. 17, R. 220–221, see also the Comptroller General's Report for 1954, H. Doc. No. 160, 84th Cong., 1st Sess., p. 2 (R. 42).

any ministerial duty at all upon petitioner, it would have been immediately to increase the tolls to 95¢ per net vessel ton.

Moreover, as we have noted, one objective of the 1950 amendment was to consider the Canal operations and the supporting business activities as an economic unit; the profits of the latter were to be used to reduce the cost of the Canal operations (*supra,* pp. 14, 15). A statutory interpretation which seeks to insulate a deficit in business operations from the Canal operations conflicts with the basic philosophy of the 1950 Act.

The sum of it is that petitioner's interpretation of the toll formula—that a deficit in the operation of the supporting business activities, especially if created by an allocation of the costs of the Canal Zone Government, constitutes costs "of maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto" which are recoverable through tolls—is in full accord with the statutory language and with the expressed congressional purposes.

In any event, petitioner's is a far more reasonable interpretation of the statute than respondents' contention, according to which the tolls have to be lowered rather than raised, and the resulting deficit charged to the United States. And the basic issue in these proceedings is not whether our interpretation of the statute is correct—we believe that it is—but whether or not it is "capricious or arbitrary"[5] or "clearly erroneus"[6] (*supra,* pp. 73–74). Even those

[5] *Work* v. *Rives*, 267 U. S. 175, 183.

[6] *United States ex rel. Chicago Great Western R. R. Co.* v. *Interstate Commerce Commission*, 294 U. S. 50, 63.

who disagree have to concede that the matter is not "peradventure clear".[1] In these circumstances, petitioner's task of interpreting the very statute entrusted to its administration constitutes a discretionary duty (*supra,* p. 73), or, as this Court held in *Interstate Commerce Commission* v. *New York, N. H. & H. R. R. Co.,* 287 U. S. 178, 204, "Where a duty is not plainly prescribed, but is to be gathered by doubtful inference from statutes of uncertain meaning, 'it is regarded as involving the character of judgment or discretion' (*Wilbur* v. *United States ex rel Kadrie, supra* [281 U. S. 206, 219]), and mandamus is thereby excluded".

(5). In our petition for a writ of certiorari (pp. 37–41), we suggested that the departure by the court below from the accepted standards governing the exercise of a court's mandatory powers was understandable only on the basis that the Court of Appeals believed that petitioner was subject to the ministerial duty to comply with the Comptroller General's audit report. We showed that this is not the import of the Government Corporation Control Act (Petition in No. 251, pp. 37–41). Respondents' brief in opposition (p. 2) stated formally that the "Court of Appeals did not hold and the plaintiffs [respondents] did not maintain or even intimate that the GAO interpretation of the statute *.* * was binding on defendant [petitioner]". Respondents stressed that the Court of Appeals ruled on the meaning of Sections 411 and 412 on the merits, and repeatedly referred

[1] *United States ex rel. Chicago Great Western R. R. Co.* v. *Interstate Commerce Commission,* 294 U. S. 50, 63.

to the second question presented in our petition as a "false issue".[8] Respondents thus seem to have abandoned the argument made in par. 10 of their complaint (R. 6) and par. 3 of the affidavit supporting their motion for summary judgment (R. 13–15) that the accounting determinations of the Comptroller General are final and conclusive on petitioner. In view of this concession, we shall not burden this brief with any argument on this issue.

2. *The district courts outside the District of Columbia lack jurisdiction to entertain actions in the nature of original writs of mandamus.*

a. *Congress has not conferred original mandamus powers on the federal courts outside the District of Columbia.* In the preceding part of this brief (*supra*, pp. 71–90), we have shown that this action, designed to compel official action in the nature of mandatory proceedings, cannot be maintained because the duties involved are not ministerial. Here, we shall show that, in any event, the District Court for the Southern District of New York lacked jurisdiction because the power to maintain mandatory proceedings has not been conferred upon it.

(*1*). A long line of cases relying on Sections 11 and 14 of the Judiciary Act of 1789 (1 Stat. 78, 81–82, now 28 U. S. C. 1332, 1345, 1651) holds that Congress did not confer upon the district courts outside the District of Columbia jurisdiction to grant original writs of mandamus or other prerogative writs. *McIntire* v. *Wood*, 7 Cranch 503, 504; *McClung* v. *Silli-*

[8] Brief in Opposition in No. 251, pp. 2, 3, 5.

man, 6 Wheat. 598; *Bath County* v. *Amy*, 13 Wall. 244, 248; *Rosenbaum* v. *Bauer*, 120 U. S. 450; *Knapp* v. *Lake Shore & Michigan Southern Ry. Co.*, 197 U. S. 536; *Covington & Cincinnati Bridge Co.* v. *Hager*, 203 U. S. 109; *Stevenson* v. *Holstein-Friesian Ass'n*, 30 F. 2d 625, 626 (C. A. 2); *Truth Seeker Co.* v. *Durning*, 147 F. 2d 54, 56 (C. A. 2); *Amchanitzky* v. *Sinnot*, 69 F. 2d 97 (C. A. 2).

This lack of power has not been remedied by Rule 81 (b) of the Federal Rules of Civil Procedure which abolished the writ of mandamus and in its stead provided relief by appropriate action or motion, nor by the codification of Title 28 in 1948.[9] *United States ex rel. Vassel* v. *Durning*, 152 F. 2d 455 (C. A. 2); *Insular Police Commission* v. *Lopez*, 160 F. 2d 673, 677 (C. A. 1), certiorari denied, 331 U. S. 855; *Petrowski* v. *Nutt*, 161 F. 2d 938, 939 (C. A. 9), certiorari denied, 333 U. S. 842; *Marshall* v. *Crotty*, 185 F. 2d 622, 627 (C. A. 1); *Biggs* v. *Ward*, 212 F. 2d 209, 211 (C. A. 7); *Updegraff* v. *Talbott*, 221 F. 2d 342, 346 (C. A. 4); *MacNeil Bros. Co.* v. *Justices of the Superior Court*, 242 F. 2d 273, 274–275 (C. A. 1). Most recently, the Court of Appeals for the Seventh Circuit, for similar reasons, held that the federal courts lack jurisdiction to grant the prerogative writ of quo warranto unless expressly authorized to do so. *United States ex rel. Wisconsin* v. *First Federal Savings & Loan Ass'n*, 248 F. 2d 804 (C. A. 7),

[9] For a discussion of the legislative development, see *Marshall* v. *Crotty*, 185 F. 2d 622, 626–627 (C. A. 1).

pending on petition for a writ of certiorari, No. 732, October Term, 1957.

Section 10 (b) of the Administrative Procedure Act, *infra*, p. 171, pursuant to which judicial review may be had in "any court of competent jurisdiction" by "any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus)" does not confer any additional power on the district courts. It presupposes existing "competent" jurisdiction and does not contain a new grant of judicial power, or render competent a court which otherwise lacks jurisdiction. *Blackmar* v. *Guerre*, 342 U. S. 512, 515–516; *Almour* v. *Pace*, 193 F. 2d 699, 701, fn. 5 (C. A. D. C.); *Aktiebolaget Bofors* v. *United States*, 194 F. 2d 145, 149 (C. A. D. C.); *Adcox Schools* v. *Administrator of Veterans Affairs*, 217 F. 2d 54 (C. A. 9); *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924, 932–933 (C. A. D. C.), certiorari denied, 350 U. S. 884.

(*2*). Congress is fully aware that the district courts outside of the District of Columbia lack jurisdiction to grant original writs of mandamus. Whenever Congress feels that district courts should have authority to grant that type of relief for the enforcement of a specific statute, the legislation expressly so provides. Many important and recent statutes contain such clauses, see *e. g.*, the Federal Trade Commission Act, Section 9 (38 Stat. 722, 15 U. S. C. 49), Securities Act of 1933, Section 20 (c) (48 Stat. 86, 15 U. S. C. 77t); Securities Exchange Act of 1934, Section 21 (f) (48 Stat. 899, 15 U. S. C. 78u (f); Federal Power Act, Section 314 (b) (49 Stat. 861, 16 U. S. C. 825m);

Railway Labor Act of 1934, Section 3 (p) (48 Stat. 1189, 45 U. S. C. 153 (p); Bridge Act of 1940, Section 9 (54 Stat. 500, 33 U. S. C. 519); Interstate Commerce Act, Section 5 (8), as enacted by the Transportation Act of 1940, Section 7 (54 Stat. 908, 49 U. S. C. 5 (8)), and Section 20 (9), as added by the Act of June 29, 1906, Section 7 (34 Stat. 593, 49 U. S. C. 20 (9); Federal Deposit Insurance Act of September 21, 1950, Section 2 (7) (f)), 64 Stat. 878, 12 U. S. C. 1817 (f).[10] Thus, while Congress has dealt with this problem as recently as 1950, it has not considered it necessary or desirable to confer general mandamus jurisdiction upon the district courts outside the District of Columbia. Congress may have felt that many mandamus actions would be brought against Government officials and that such proceedings should be centralized in the District of Columbia (cf. *Brüner v. United States*, 343 U. S. 112, 114–115).

In these circumstances, there is no occasion to re-examine the interpretation of the original Judiciary Act made by this Court 145 years ago. This ruling has been repeatedly reaffirmed by the Court; it has been followed almost unanimously by the lower federal courts. Congress also has adopted it. Any

[10] For other and earlier statutes, still in effect, which confer mandamus powers on district courts outside the District of Columbia in specifically defined circumstances, cf. R. S. 5262, 45 U. S. C. 88; Act of August 7, 1888, Section 3, 25 Stat. 383, 47 U. S. C. 11; Act of March 2, 1917, Section 48, 39 Stat. 967, 48 U. S. C. 872; Federal Water Power Act of 1920, Section 26, 41 Stat. 1076, 16 U. S. C. 820; Act of March 4, 1927, Section 3, 44 Stat. 1424, 15 U. S. C. 433; Tariff Act of 1930, Section 333 (c), 46 Stat. 699, 19 U. S. C. 1333 (c).

change should come from that body. *Missouri* v. *Ross*, 299 U. S. 72, 75; *Hecht* v. *Malley*, 265 U. S. 144, 153; *United States* v. *Ryan*, 284 U. S. 167, 175; *Shapiro* v. *United States*, 335 U. S. 1, 16.

(*3*). The 1950 amendment to the Canal Zone Code did not confer mandamus jurisdiction upon the district courts by implication. That Congress has in many instances explicitly granted mandamus powers to the district court (*supra*, pp. 92–93) indicates that Congress knows how to express itself when it intends that these courts should exercise such powers. Accordingly, mandamus jurisdiction should not be found easily by way of implication. *Knapp* v. *Lake Shore and Michigan Southern Ry. Co.*, 197 U. S. 536, 543. Also, there is nothing in the 1950 statute suggesting a purpose to confer mandamus jurisdiction. The fact that petitioner is a corporation is irrelevant; so were the defendants in *Knapp* v. *Lake Shore & Michigan Southern Ry. Co.*, *supra*, and in *Stevenson* v. *Holstein-Friesian Ass'n*, 30 F. 2d 625 (C. A. 2). That petitioner has been made suable in the Southern District of New York (Section 245, *infra*, p. 148) does not constitute a grant of mandamus jurisdiction to that court. It means that the court may give all the relief it has jurisdiction to give, but no more. *Knapp* v. *Lake Shore and Michigan Southern Ry. Co.*, *supra*, at 542. Moreover, petitioner's Secretary maintains his office in the District of Columbia.[11] Mandatory relief against petitioner thus would be available in appro-

[11] Congressional Directory, 85th Cong., 2nd Sess., p. 555; United States Government Organization Manual, 1957–58, p. 444. See also *infra*, p. 181.

priate cases in the courts of the District of Columbia.

b. *The district court's lack of jurisdiction to grant mandatory relief was not cured by respondents' prayers for injunctive or declaratory relief.* (1) Respondents did not limit the prayers in their complaint to an order directing petitioner to prescribe new tolls (prayer No. 3, R. 8). They also asked for a declaration of petitioner's duty to prescribe new tolls (prayer No. 1, R. 8), and for an order enjoining petitioner from withholding or delaying the prescription of tolls and from using accounts different from those determined by the General Accounting Office (prayers 2 and 4, R. 8). These additional requests for relief, however, do not cure the lack of jurisdiction.

Prayers Nos. 2 and 4 ask that petitioner be enjoined from withholding and delaying official action and from using accounts less favorable than those determined by the Comptroller General. This is the equivalent of a direct order requiring petitioner to take the designated official action, and to use the accounts determined by the Comptroller General. The jurisdiction of the district courts obviously cannot depend on the circumstance whether a court order is phrased in the positive or the negative, or whether the complaint is entitled a petition for a writ of mandamus, or a prayer for an injunction.

This Court has recognized, beginning with *Gaines* v. *Thompson*, 7 Wall. 347, 352, that mandamus and mandatory injunction are legal equivalents, subject to the same rules, and that the form of the relief sought is irrelevant. *Litchfield* v. *Register and Receiver*, 9 Wall. 575, 577; *Marquez* v. *Frisbie*, 101 U. S. 473,

475; *Smith* v. *Bourbon County,* 127 U. S. 105, 112; *New Orleans* v. *Paine,* 147 U. S. 261, 268; *Warner Valley Stock Co.* v. *Smith,* 165 U. S. 28, 33; *Miguel* v. *McCarl,* 291 U. S. 442, 452; *Virginian Ry. Co.* v. *System Federation, No. 40,* 300 U. S. 515, 551; cf. *Adams* v. *Nagle,* 303 U. S. 532, 542; *Colegrove* v. *Green,* 328 U. S. 549, 555; *Whitehouse* v. *Illinois Central R. Co.,* 349 U. S. 366, 373–374.

The inability of the district courts to grant mandatory relief goes to the substance and not to the form (*Smith* v. *Bourbon Co.,* 127 U. S. 105, 112), and cannot be circumvented by labelling an essentially mandatory proceeding as a bill in equity (*Smith* v. *Bourbon Co.,* 127 U. S. 105, 112; *Youngblood* v. *United States,* 141 F. 2d 912, 915 (C. A. 6); *Biggs* v. *Ward,* 212 F. 2d 209, 211 (C. A. 7)), or by the use of double negatives (*Knickerbocker Ice Co.* v. *Sprague,* 4 F. Supp. 499 (S. D. N. Y.)). In other words, the federal courts cannot by indirection do what they lack the power to do directly. *Finerau* v. *Bailey,* 2 F. 2d 363 (C. A. 5); cf. *Stevenson* v. *Holstein-Friesian Ass'n,* 30 F. 2d 625, 626 (C. A. 2).

(2). This Court's decision in *Virginian Ry. Co.* v. *System Federation No. 40,* 300 U. S. 515, does not depart from these well-established rules. Rather, it reaffirms them by referring expressly to the equivalence of mandatory injunction and mandamus (at p. 551). The basic dispute in that case, as appears from an inspection of the briefs, was whether orders of the National Mediation Board issued pursuant to Section 2 Ninth of the Railway Labor Act of 1934 (48 Stat. 1186, 45 U. S. C. 152 Ninth created rights

enforceable in judicial proceedings, including mandatory injunctions, or whether they constituted merely unenforceable recommendations. The parties joined issue on that proposition alone.

The question whether district courts outside the District of Columbia had jurisdiction to grant a mandatory injunction in that situation was not raised by any party, nor discussed by the Court. Everyone apparently assumed that Section 3 First (p) (48 Stat. 1189, 45 U. S. C. 153 First (p)), which authorizes the district courts to enforce orders of the Adjustment Board "by writ of mandamus or otherwise," applied also to proceedings authorized by Section 2 of the Act.[12]

Subsequent decisions of this Court indicate that *Virginian Ry. Co., supra*, did not constitute an abandonment of the rule that, since mandamus and mandatory injunctions are equivalents, the latter relief may be granted only by courts vested with mandamus jurisdiction. *Adams* v. *Nagle*, 303 U. S. 532, 542, refers to the close relation between those two remedies. *Colegrove* v. *Green* 328 U. S. 549, 555, quotes with approval Professor Chafee's statement that "What might not be done directly by mandamus, could not be attained indirectly by injunction". Again, in *Whitehouse* v. *Illinois Central R. Co.*, 349 U. S. 366, 373–374, the Court agreed that where relief, although

[12] For other instances in which enforcement and review rights under that statute were viewed in the light of the statutory plan as a whole, see *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 304–306; *General Committee* v. *Missouri-Kansas-Texas R. R. Co.*, 320 U. S. 323, 330–337.

labeled equitable, sought affirmative action, it must be viewed "in the nature of mandamus",[13] and reaffirmed the essential equivalence of the two remedies in that situation. The lower courts have agreed that district courts lack the power to grant a type of relief which, whether called mandamus or injunction, "would have resulted in an order of the District Court commanding the defendant to do as plaintiff wished. This, in its essence, is a petition for writ of mandamus, which is not within the District Court's jurisdiction". *Biggs* v. *Ward*, 212 F. 2d 209, 211 (C. A. 7).

(*3*). Similarly, the district court had no jurisdiction to grant the declaratory relief sought in Prayer No. 3 of the complaint (R. 8). The Declaratory Judgment Act does not enlarge the jurisdiction of the federal courts nor permit the granting by indirection of relief which cannot be given directly. That statute merely enables the courts to give a new type of relief by declaring the plaintiff's right, even though no immediate enforcement is contemplated.[14] It always presupposes, however, that the federal courts have jurisdiction. *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U. S. 667, 671–672; *Clark* v. *Memolo*, 174 F. 2d 978, 980 (C. A. D. C.), and authorities there cited; *Cadillac Publishing Co.* v. *Summerfield*, 227 F. 2d 29, 30 (C. A.

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[13] *Illinois Central R. Co.* v. *Whitehouse*, 212 F. 2d 22, 30 (C. A. 7).

[14] Respondents obviously contemplate the immediate enforcement of their claim. In those circumstances, it is questionable whether the prayer for declaratory judgment has any separate justification. In any event, they cannot derive any procedural benefit from it.

D. C.), certiorari denied, 350 U. S. 901; *Morgantown Glassware Guild* v. *Humphrey*, 236 F. 2d 670, 672 (C. A. D. C.), certiorari denied, 352 U. S. 896.

It follows that the district courts may grant declaratory judgments only in those circumstances in which they have power to grant affirmative relief. *Putnam* v. *Ickes*, 78 F. 2d 223, 226 (C. A. D. C.); *Doehler Metal Furniture Co.* v. *Warren*, 129 F. 2d 43, 45–46 (C. A. D. C.), certiorari denied, 317 U. S. 663; *Aktiebolaget Bofors* v. *United States*, 194 F. 2d 145, 150 (C. A. D. C.). Accordingly, it has been held that courts which do not have the power to award mandatory relief also lack jurisdiction to declare the rights of the parties. *Marshall* v. *Crotty*, 185 F. 2d 622, 626–628 (C. A. 1); *Marshall* v. *Wyman*, 132 F. Supp. 169, 174 (N. D. Cal.).

To grant declaratory relief in the circumstances of this case would lead to serious complications. An enforcement order pursuant to 28 U. S. C. 2202 could not be granted because it obviously would be mandatory in nature. This Court, however, has ruled from the earliest times that the judicial power of the United States should not issue decisions which cannot be enforced against the executive branch. *Hayburn's Case*, 2 Dall. 409; *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U. S. 103, 113–114. If, on the other hand, it is felt that petitioner could not ignore the declaratory judgment but would be under the strongest moral if not legal compulsion to comply

with it,[15] the ruling would then be plainly mandatory in nature and beyond the jurisdiction of the District Court. In either event, the District Court would lack jurisdiction to issue the declaratory relief.

C. RESPONDENTS LACK STANDING TO ASSERT THAT PETITIONER VIOLATED ITS OFFICIAL DUTIES WITH RESPECT TO THE DETERMINATION OF THE CANAL TOLLS

In this portion of our brief we shall demonstrate that respondents lack standing to challenge the alleged violation of petitioner's duties with respect to the Canal tolls.

Section 10 (a) of the Administrative Procedure Act deals with this question of standing, an issue which also goes to the jurisdiction of the court. *United States* v. *Storer Broadcasting Co.*, 351 U. S. 192, 197. Section 10 (a) provides that:

> Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Interpreted in the light of its general background and immediate history, this provision of the Admin-

[15] Note in this connection the practice of the courts in the District of Columbia Circuit pursuant to which declaratory relief rather than mandamus is awarded out of courtesy to the executive branch, and a mandatory order entered only in case of noncompliance with the declaratory judgment. *Borak* v. *Biddle*, 141 F. 2d 278, 281, certiorari denied, 323 U. S. 738; *Money* v. *Anderson*, 208 F. 2d 34, 38, fn. 13; *Mulligan* v. *Andrews*, 211 F. 2d 28, 31; *Norden* v. *Royall*, 90 F. Supp. 834, 835–836 (C. A. D. C.).

istrative Procedure Act does not enable respondents to maintain this action. Rather, it precludes the suit.

1. *Prior to the Administrative Procedure Act, administrative action could be challenged only by a person who sought redress of the violation of a specific duty owed to him by a public official, or by one "adversely affected" on whom the right to seek judicial review had been conferred by statute.*

a. *In the absence of specific statutory provision, a litigant seeking to challenge administrative action must show more than merely an adverse personal effect.* Under our system of government, the courts have no general visitatorial power over the legislative and executive branches. The mere fact that a court believes administrative or legislative action to be erroneous or unconstitutional does not give it any authority to intervene or veto.[16] The court's power to review administrative or legislative action is dependent upon the existence of a case or controversy in which a particular plaintiff complains of an interference with a specific right or of the failure to perform a duty owed to him personally. *Osborn* v. *The Bank of the United States*, 9 Wheat. 738, 819; *Marbury* v. *Madison*, 1 Cranch 137, 162–173, and footnote 16, *supra*, p. 101. It is not enough that the suitor claims to vindicate the general interest in the proper administration of the laws, which is common to all members of the public. ***Fairchild* v. *Hughes*,**

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[16] *Work* v. *Rives*, 267 U. S. 175, 183; *Cohens* v. *Virginia*, 6 Wheat. 264, 405; *Craig* v. *Leitensdorfer*, 123 U. S. 189, 211; *Muskrat* v. *United States*, 219 U. S. 346, 357; *Massachusetts* v. *Mellon*, 262 U. S. 447, 488; *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 467, 478–479.

258 U. S. 126, 129; *Western Pacific Railroad Co.* v. *Southern Pacific Co.*, 284 U. S. 47, 51; *Ex parte Lévitt*, 302 U. S. 633, 634; *Stark* v. *Wickard*, 321 U. S. 288, 304.

On comparable principles, the federal courts cannot review administrative or legislative action solely upon an allegation of a financial loss. Unless the loss follows from the invasion of a legal or equitable right, or the violation of a duty owed to the complainant, it constitutes *damnum absque injuria* and does not give any occasion for the exercise of judicial power. *Stark* v. *Wickard*, 321 U. S. 288, 304; *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 125; *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 478–480. Thus, where administrative or legislative action simply deprives a person of a competitive advantage, or subjects him to lawful competition, the financial loss is not sufficient to permit the judiciary to examine the legality of the challenged action. *Edward Hines Trustees* v. *United States*, 263 U. S. 143; *Sprunt & Son* v. *United States*, 281 U. S. 249; *Alabama Power Company* v. *Ickes*, 302 U. S. 464, 478–485; *Tennessee Power Co.* v. *T. V. A.*, 306 U. S. 118, 137. Similarly, a consumer has no general standing to complain that the Treasury allegedly is exacting excessive customs duties, *Louisiana* v. *McAdoo*, 234 U. S. 627, 631–632; or that minimum prices have been computed incorrectly, cf. *City of Atlanta* v. *Ickes*, 308 U. S. 517; *Stark* v. *Wickard*, 321 U. S. 288, 319 (dissenting opinion). *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, holds that, since a Government con-

tractor has no legal right to deal with the Government, he cannot be heard to complain that alleged violations of the law by Government contracting officer's subject him to financial loss. The power of the courts to review the legality of legislative or administrative action is an incident of their function to decide concrete cases and controversies, and normally presupposes the invasion of "a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." *Tennessee Power Co.* v. *T. V. A.*, 306 U. S. 118, 137–138.

This historical limitation of the power to challenge the legality of administrative or private action to those whose "legal rights" have been directly injured is not a mere "legal technicality" or "obstruction on the road of justice".[17] It constitutes a necessary element in judicial administration. This Court has pointed out that, if everyone who has suffered, or fears to suffer, a financial loss as the result of the acts of a private individual or of an official could challenge their validity in court, "a vista of litigation hitherto unrevealed" would be opened. *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 480–481.

In this very case, if an adverse financial effect were a sufficient criterion to confer standing, petitioner's rate determination could be challenged not only by respondents on the ground that the tolls are too high,

[17] Cf. *United States* v. *Storer Broadcasting Company*, 351 U. S. 192, 213–214 (dissenting opinion of Frankfurter, J.).

but also by competing railroads on the ground that they are too low.[18] Canal shippers and passengers would also have standing. Even shippers by railroad could claim that high Canal tolls affect them adversely, because, if the tolls were lower, the railroad would have to decrease its rates in order to meet this competition.[19] And since the interests of these financially-affected parties frequently are diametrically opposed, judicial proceedings at the suit of only one of them are not likely to do complete justice.[20]

b. *Congress may authorize a person adversely affected by administrative action to vindicate the public interest.* The authority of the courts to pass on the legality of administrative action at the suit of private individuals does not rest solely on their constitutional or equity powers to decide cases and controversies involving specific legal or equitable rights. In many instances, the review powers of the courts are derived

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[18] See *supra*, p. 68. Indeed, it is not improbable that the adverse effect of inadequate tolls upon the railroads would be far more serious than that of excessive ones upon respondents. The latter usually can be passed on to the shippers, at least in part (see *infra*, pp. 143–144). On the other hand, if as the result of lowered tolls on the Panama Canal, the railroads have to decrease their transcontinental freight rates, they would have to absorb the loss themselves.

[19] Cf. the letter of the Western States Meat Packers Association to Senator Byrd, dated September 1, 1950, *Maintenance and Operation of the Panama Canal*, Hearing before a Subcommittee of the Committee on Armed Services, United States Senate, 81st Cong., 2d Sess., on H. R. 8677, pp. 40–41.

[20] This problem has found its technical solution in administrative proceedings, in which all the conflicting financial interests may participate, followed by statutory review proceedings where provided by Congress, cf. pp. 104–107.

from express statutory authorization. In certain of these statutory proceedings, review may be had at the suit of a "person who is aggrieved or whose interests are adversely affected",[21] a "party to the proceeding * * * aggrieved by an order issued by the Commission",[22] a "party aggrieved by a final order",[23] or a "person aggrieved by an order issued by the Commission in a proceeding to which such person is a party".[24]

It is significant that these formulae are found in regulatory statutes. Administrative action in such cases usually affects a direct legal interest of the regulated person who would generally be entitled to judicial review under the equity powers of the courts;

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[21] Federal Communications Act, Section 402 (b) (6), 48 Stat. 1093, as amended, 47 U. S. C. 402 (b) (6).

[22] Federal Power Act, Section 313, as amended by the Act of August 26, 1935, Title II, Section 213, 49 Stat. 860, 16 U. S. C. 825l; Natural Gas Act, Section 19, 52 Stat. 831; 15 U. S. C. 717r.

[23] Act of December 29, 1950, Section 4, 64 Stat. 1130, 5 U. S. C. 1034.

[24] Securities Exchange Act of 1934, Section 25, 48 Stat. 901, 15 U. S. C. 78y. The Bituminous Coal Act of 1937, which expired in 1943, contained a similar formula, Section 6 (b), 50 Stat. 85, 15 U. S. C. (1940 Ed.) 836 (b), cf. *Associated Industries* v. *Ickes*, 134 F. 2d 694, 699 (C. A. 2), vacated as moot, 320 U. S. 707.

The Securities Act of 1933, Section 9, 48 Stat. 80, 15 U. S. C. 77i, and the Public Utilities Holding Act of 1935, Section 24, 49 Stat. 834, 15 U. S. C. 79x, use the formula "any person [or party] aggrieved by an order of the Commission". The requirement of seeking a rehearing before the Commission prior to judicial review, however, tends to indicate that even here Congress assumed some kind of participation in the administrative proceedings on the part of the person seeking judicial review. Cf. *American Power & Light Co.* v. *Securities & Exchange Commission*, 325 U. S. 385, 388–391.

it affects indirectly the interests of a large body of others, such as competitors, consumers, shippers, stockholders, who, lacking a direct legal right, normally could not invoke the general equity jurisdiction of the federal courts. If the regulating body committed an error of law in favor of the regulated person, no one could obtain a correction of the order if equity principles of standing were invoked. Congress has therefore selectively authorized certain of those individuals indirectly or financially affected by regulatory action to seek review because "one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission". *Federal Communications Commission* v. *Sanders Radio Station,* 309 U. S. 470, 477; *Scripps-Howard Radio* v. *Federal Communications Commission,* 316 U. S. 4, 14; *Federal Communications Commission* v. *National Broadcasting Company,* 319 U. S. 239, 246–247; *American Power & Light Co.* v. *Securities and Exchange Commission,* 325 U. S. 385, 390. But most of these statutes give the right to judicial review only to parties to the administrative proceeding. The power to seek review in statutory proceedings is therefore limited to those who are directly regulated, or in selected instances to those who have an interest sufficiently substantial to justify their intervention in the administrative proceedings.[25]

[25] The theory justifying statutory judicial review at the suit of an adversely affected person whose own rights have not been invaded has been explained in *Associated Industries* v. *Ickes,* 134 F. 2d 694, 704 (C. A. 2), vacated as moot, 320

In short, prior to the Administrative Procedure Act, a person had standing to obtain judicial review (a) under the general equity jurisdiction of the federal courts, if he could show the invasion of a right or the violation of a duty owed to him; or (b) if he was an adversely-affected person within the meaning of a specific statute establishing a particular review procedure. In the latter case, he was able to obtain relief in the statutory proceeding, even if his interest was not strong enough to invoke the equity jurisdiction of the district courts directly.[26]

U. S. 707. The *Associated Industries* case which involved proceedings under the Bituminous Coal Act of 1937 (*supra*, p. 105, fn. 24) held that Congress could authorize a public official "such as the Attorney General, to bring a proceeding to prevent another official from acting in violation of his statutory powers; for then an actual controversy exists, and the Attorney General can properly be vested with authority, in such a controversy, to vindicate the interest of the public or the government". Similarly, Congress can authorize a non-official person to bring suit to prevent action by an officer in violation of his statutory powers. The adversely affected person or party thus is a private Attorney General or King's proctor (*Colorado Radio Corporation* v. *Federal Communications Commission*, 118 F. 2d 24, 28 (C. A. D. C., concurring opinion of Edgerton, J.)), charged with the vindication of the public interest in the proper administration of the law. *Scripps-Howard Radio* v. *Federal Communications Commission*, 316 U. S. 4, 14; *Associated Industries* v. *Ickes*, *supra* at 704; *Granik* v. *Federal Communications Commission*, 234 F. 2d 682, 684 (C. A. D. C.); *City of Pittsburgh* v. *Federal Power Commission*, 237 F. 2d 741, 746–747, 748 (C. A. D. C.).

[26] Compare *City of Atlanta* v. *Ickes*, 308 U. S. 517, with *Associated Industries* v. *Ickes*, *supra*, pp. 106–107, fn. 25, at 701–702; cf. *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924, 934, fn. 20 (C. A. D. C.), certiorari denied, 350 U. S. 884; *City of Pittsburgh* v. *Federal Power Commission*, 237 F. 2d 741, 748 (C. A. D. C.).

2. *Section 10 (a) of the Administrative Procedure Act is essentially a restatement of the pre-existing law as to standing.*

As noted above, Section 10 (a) of the Administrative Procedure Act provides:

> Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

The main question raised by this provision is whether it was designed to restate the existing law of standing, or whether it constitutes a blanket authority permitting any person adversely affected or hurt by agency action to challenge the legality of that action as a "private Attorney General". We submit that the former interpretation must be accepted.

a. The broader reading does not fit with the language Congress used. It would require the deletion of the crucial phrase "within the meaning of any relevant statute", and in the words of the Court of Appeals for the District of Columbia Circuit, "That view, of course, cannot be accepted". *Kansas City Power & Light Company* v. *McKay*, 225 F. 2d 924, 932, certiorari denied, 350 U. S. 884. That phrase indicates that, in enacting Section 10 (a), Congress did not intend to open "a vista of litigation hitherto unrevealed",[27] but rather left the question of whether indirectly-or-financially-injured-persons could obtain review to the specific substantive legislation which

[27] Cf. *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 481, *supra*, p. 103.

in each case would establish procedures under which the administrative agency or the courts could determine whether the plaintiff's interest was substantial enough to justify his appearance as a private Attorney General.[28]

b. The legislative history of Section 10 (a) and subsequent congressional action in this area support this interpretation that the provision was designed to restate existing law.

(*1*). As a whole, the legislative history of the Procedure Act does not disclose any intent radically to depart from the rules on standing. It is true that there are some statements which might convey the impression that everyone "injured" by adverse administrative action was entitled to judicial review. We believe, however, that these passages were directed at the problem with which the Act was mainly concerned, *i. e.*, the relief available to a person directly affected by a regulatory order. Whenever the discussion was focused upon the issue here involved—the standing of one merely financially affected—the legislative proceedings make it clear that Section 10 (a) "reflects existing law".

The Senate Committee Report[29] commented on Section 10 (a) as follows:

> This subsection [Section 10 (a)] confers a right of review upon any person adversely affected in fact by agency action or aggrieved

[28] Cf. Civil Aeronautics Act, Section 1006, 49 U. S. C. 646, giving a right to seek review to any person "disclosing a substantial interest in such order".

[29] S. Rept. 752, 79th Cong., 1st Sess., p. 26; *Legislative History of the Administrative Procedure Act*, S. Doc. 248, 79th Cong., 2d Sess., p. 212.

> within the meaning of any statute. The phrase "legal wrong" means such a wrong as is specified in subsection (e) of this section. It means that something more than mere adverse personal effect must be shown—that is, that the adverse effect must be an illegal effect. The law so made relevant is not just constitutional law but any and all applicable law.

This statement is not at all clear. On the one hand, if taken literally, the explanation might mean that the mere fact that a person is injured by administrative action is not sufficient to afford him a right to review; the action must, in addition, violate some law. In that view, standing would depend upon the merits of the challenger's claim. On the other hand, the Committee's statement might well have been intended as a shorthand summary of the existing law on standing.[30] Other relevant materials in the history of the Act strongly suggest that the latter position is correct—that the Committees and Congress did not intend any radical departure from the existing rules.

One of the focal elements in the history of the Act is a letter to Senator McCarran, the Chairman of the Senate Judiciary Committee, from the Attorney General, in which the latter commented favorably on the then pending legislation. Attached to the letter was an appendix discussing the principal provisions

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[30] In *United States* v. *Storer Broadcasting Co.*, 351 U. S. 192, 197, fn. 6, the majority opinion relied on this explanation of Section 10 (a), and on the virtually identical analysis in House Report No. 1980, 79th Cong., 2d Sess., p. 42; *Legislative History of the Administrative Procedure Act*, *supra*, p. 109, fn. 29, p. 276.

of the bill. The Attorney General felt it "advisable" to transmit these comments to Congress so that it "may serve to clarify some of the essential issues and may assist the committee in evaluating the impact of the bill on public and private interests".[31] The Senate Committee incorporated the letter and appendix in its report;[32] they were read into the Congressional Record as an extension of remarks by Representative Hobbs because they were "so helpful";[33] and significant references to them were made in the Senate debate, in particular in connection with the standing problem (*infra*, pp. 113–115). In these circumstances, the Attorney General's letter and the appendix attached to it constitute an integral part of the legislative history of the Act and a useful tool in the determination of the purposes Congress sought to accomplish by the legislation. *American Stevedores* v. *Porello*, 330 U. S. 446, 452.

The comments in the appendix to the Attorney General's letter with respect to Section 10 (a) were:

> * * * This reflects existing law. In *Alabama Power Co.* v. *Ickes* (302 U. S. 464), the Supreme Court stated the rule concerning per-

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[31] S. Rept. 752, 79th Cong., 1st Sess., pp. 37–38; *Legislative History of the Administrative Procedure Act*, *supra*, p. 109, fn. 29, pp. 223–224.

[32] S. Rept. 752, 79th Cong., 1st Sess., pp. 5, 37–45; *Legislative History of the Administrative Procedure Act*, *supra*, p. 109, fn. 29, pp. 191, 223–231. The House Report in turn refers to the Senate Report, *infra*, p. 116, and the Attorney General, letter and the comments annexed to it.

[33] 92 Cong. Rec. A2982.

sons entitled to judicial review.[34] Other cases having an important bearing on this subject are: *Massachusetts* v. *Mellon* (262 U. S. 447),[35] the *Chicago Junction Case* (264 U. S. 258),[36] *Sprunt & Son* v. *United States* (281 U. S. 249),[37] and *Perkins* v. *Lukens Steel Co.* (310 U. S. 113).[38] An important decision interpreting the meaning of the terms "aggrieved" and "adversely affected" is *Federal Communications*

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[34] *Alabama Power Co.* v. *Ickes*, *supra*, pp. 102–103, holds that standing to challenge alleged illegal administrative action presupposes the direct violation of a legal right, not merely a financial disadvantage. The opinion stressed that, absent this limitation, the courts would be subject to a flood of unprecedented litigation (302 U. S. at 478–481).

[35] *Massachusetts* v. *Mellon*, *supra*, p. 101, fn. 16, holds that the courts have no power *per se* to review allegedly illegal or unconstitutional action, that such questions may be considered only as incidents to the determination of a case or controversy alleging the violation of a legal right, and that a taxpayer's financial interest is insufficient to create such standing (262 U. S. at 488).

[36] The *Chicago Junction Case*, *infra*, p. 125, holds that Congress may enlarge the scope of available judicial review by creating new substantive rights or new statutory special interests (264 U. S. at 266–267).

[37] *Sprunt & Son* v. *United States*, *supra*, p. 102, holds that, absent an independent legal right, a consignee of railroad shipments has no right to seek review of an order of the Interstate Commerce Commission addressed to certain railroads which deprived the consignee of certain competitive advantages (281 U. S. at 256–257).

[38] *Perkins* v. *Lukens Steel Co.*, *supra*, pp. 102–103, holds that a person holding Government contracts has no standing to challenge an allegedly illegal interpretation of the [Walsh-Healey] Public Contracts Act of 1936. It stresses that statutes which are not of a regulatory type but affect Government contracts and Government property are not intended to create any legal rights in third persons but constitute a self-imposed restraint, of the violation of which the Government, but not private litigants, can complain; that in this area the duties of the Government officials are owed exclusively to their superiors and to Congress (310 U. S. at 127–130).

Commission v. *Sanders Bros. Radio Station* (309 U. S. 470).[39]

The debate on the Administrative Procedure Act on the floor of the Senate[40] corroborates the strong inference, suggested by the Attorney General's letter, that Section 10 (a) was not designed to change existing law. In response to an inquiry by Senator Austin about the meaning of the phrase "legal wrong" in Section 10 (a), Senator McCarran, the Chairman of the Senate Judiciary Committee and author of the Committee Report,[41] first sought to explain that term on the basis of the committee report, *supra*, pp. 109–110, *i. e.*, as an adverse "illegal effect". Senator Austin took the position that this definition actually referred to the second part of the clause, *viz.*, "or adversely affected or aggrieved by such action within the meaning of any relevant statute." Senator Austin then read the definition of "wrong" from Bouvier's Dictionary, as meaning a "violation of right", including "[i]n its broad sense * * * every injury to another", and then continued:

> The combination of words used here is very significant. The adjective "legal" is a limiting adjective; and, as it has been applied in jurisprudence to "injury" it is defined as fol-

[39] *Federal Communications Commission* v. *Sanders Bros. Radio Station*, *supra*, p. 106, holds that Congress may specifically authorize a merely financially affected person to seek judicial review (309 U. S. at 477).

[40] 92 Cong. Rec. 2152–2153; *Legislative History of the Administrative Procedure Act*, *supra*, p. 109, fn. 29, pp. 308–310.

[41] S. Rept. 752, 79th Cong., 1st Sess., p. 1; *Legislative History of the Administrative Procedure Act*, *supra*, p. 109, fn. 29, pp. 186–187.

lows in Words and Phrases, fourth series, second volume, p. 548:

> "Legal injury" must be violation of some legal right and is distinct from "damage", which is harm, or loss, sustained by injury (*Combs* v. *Hargis Bank & Trust Co.* (27 S. W. (2d) 955, 956, 234 Ky. 202)).[42]

For the sake of the future of those practicing under the estimable bill, I think it would be well to have the RECORD show whether the distinguished author of the bill regards the category of persons entitled to review which is here described, that is, "any person suffering legal wrong" as any person who has suffered in the manner described in the quotation from Bouvier's Law Dictionary.

Mr. McCarran. Taking Bouvier and Words and Phrases combined, and taking the decisions of the courts of last resort, to whose language we have access, I should answer the Senator "yes". That is, I take into consideration all the definitions which apply to define that term, and I respectfully refer to the committee report, which I read a moment ago. It means that something more than mere adverse personal effect must be shown; that is, the adverse effect must be an illegal effect. So, to Bouvier, to Words and Phrases, and to the decisions to which the able Senator refers, I also add the expression contained in the committee report.

Mr. Austin. I thank the Senator.

Mr. McCarran. Let me go a little further, because I am very grateful to the Senator for

[42] The issue in *Combs* v. *Hargis Bank & Trust Co.* was whether the negligent and careless burning of a building constituted an injury to real property within the meaning of a venue statute.

> bringing up this question. We asked the Attorney General and the Department of Justice to comment on this bill. I now read the Attorney General's comment: * * *.

Senator McCarran then read the comment (*supra*, pp. 111–112), including the statement that Section 10 (a) reflects existing law, as well as the references to *Alabama Power Co.* v. *Ickes*, *Massachusetts* v. *Mellon*, the *Chicago Junction Case*, *Sprunt & Son* v. *United States*, *Perkins* v. *Lukens Steel Co.* and *Federal Communications Commission* v. *Sanders Bros. Radio Station*, and continued:

> Mr. President, I have referred the Senator to that expression coming from the Attorney General, in connection with this bill, to indicate to him and to the Senate the meticulous study which we have tried to give to this bill, so that we may construe the terms in such a way that there may be no divergence of views when we get through.
>
> I realize that the layman says this is an intricate bill. In a way it is, and yet in a way it simplifies itself in practice.

It is significant that, by defining "legal injury" as the violation of some legal right, the colloquy between the Senators employed the same legal terminology which had previously been utilized by this Court. And if Senator McCarran had disagreed with the Attorney General's statement that Section 10 (a) "reflects existing law", he would not have read it into the Congressional Record as a guide to future practitioners.

The explanation of Section 10 (a) in the House Report [43] uses language similar to that found in the Senate report (*supra*, pp. 109–110); the report also refers to the Senate Report and, in particular, to the Attorney General's letter and to his "more detailed statement which accompanies it".[44] The analysis of the Act on the floor of the House by Representative Walter [45] explained Section 10 (a) substantially in the terms of the committee report.[46] In contrast to the proceedings in the Senate, there was no clarifying debate. However, the Attorney General's letter, together with its appendix, were inserted in the Congressional Record because they were "so helpful" (*supra*, p. 111).

The Attorney General's letter, with its unambiguous statement that Section 10 (a) "reflects existing law"—quoted in the Senate Committee Report and on the floor of the Senate, incorporated by reference into the House Committee Report, and read into the Congressional Record of the House proceedings—thus cannot be disregarded in the interpretation of Section 10 (a). Similarly, that Section must be read in the light of the prior decisions of this Court, relating to the standing problem, which were explicitly brought to the attention of Congress. *Overstreet* v. *North*

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[43] H. Rept. 1980, 79th Cong., 2d Sess., p. 42; *Legislative History of the Administrative Procedure Act*, *supra*, p. 109, fn. 29, p. 276.

[44] H. Rept. 1980, *id.* at 16; *Legislative History of the Administrative Procedure Act*, *supra*, p. 109, fn. 29, at 250.

[45] The author of the House Report, H. Rept. 1980, *id.* at p. 1; *Legislative History of the Administrative Procedure Act*, *supra*, p. 109, fn. 29, p. 235.

[46] 92 Cong. Rec. 5654; *Legislative History of the Administrative Procedure Act*, *supra*, p. 109, fn. 29, p. 369.

Shore Corporation, 318 U. S. 125, 132. There is nothing in the debates disavowing the Attorney General's clear and positive statement at a time when the Congress' attention was drawn directly to the complexities of the standing problem.

The conclusion must be, we submit, that Section 10 (a) re-enacts the dichotomy already existing in the law:—the clause "[a]ny person suffering legal wrong because of any agency action" refers to the pre-existing equity jurisdiction of the courts and the statutory provisions so phrased; the clause "or adversely affected or aggrieved by such action within the meaning of any relevant statute" relates to the specific statutory review proceedings conferring standing on adversely-affected persons.[47] Congress thus heeded the warning contained in the Final Report of the Attorney General's Committee on Administrative Procedure (at p. 85) not to attempt to define any general classification of persons who shall have standing to challenge administrative action. The Report pointed out that the standing problem had been dealt with by the courts and Congress with an eye to the particular problems presented in each individual situation, and that any attempt to go beyond that would be either "futile or dangerous." The Report also noted (at p.

[47] A person who is "adversely affected or aggrieved * * * within the meaning of any relevant statute" thus has standing to sue not by virtue of the Administrative Procedure Act but as the result of the separate substantive legislation. This interpretation, however, does not render that clause mere surplusage. If Section 10 (a) had referred only to persons suffering legal wrong, it might have been construed as repealing existing statutory review provisions authorizing actions by adversely affected persons.

80) that "The objections to judicial review have been generally not to its availability but to its scope". Congress incorporated this finding in the explanation of Section 10 (e) in the Senate Judiciary Committee's Print of the bill.[48]

(*2*). The decisions of this Court in *Heikkila* v. *Barber*, 345 U. S. 229, and *Shaughnessy* v. *Pedreiro*, 349 U. S. 48, are not to the contrary. The issue in those cases was not at all the problem of standing, but rather the availability of a new remedy—that of declaratory judgment in lieu of habeas corpus—so that the alien (who concededly had standing) could test the validity of a deportation order without first submitting to incarceration. No ruling of this Court holds that the Administrative Procedure Act enlarges standing so as to confer that right on persons in respondents' position.

(*3*). Six years after the enactment of the Administrative Procedure Act, Congress showed that Section 10 (a) of that Act was not designed to confer a blanket authorization to seek judicial review as a private Attorney General upon every person adversely affected or hurt by agency action, but that, absent the invasion of a "legal right", financially-

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[48] *Legislative History of the Administrative Procedure Act*, *supra*, p. 109, fn. 29, p. 39.

Similar statements were made before the House Judiciary Committee by Carl McFarland, then Chairman of the American Bar Association's Special Committee on Administrative Law. *Legislative History of the Administrative Procedure Act*, *supra*, p. 109, fn. 29, p. 84, "we do not believe that the principle of review or the extent of review can or should be greatly altered." See also *Legislative History of the Administrative Procedure Act*, *supra*, fn. 29, at 311, 369 and 415.

aggrieved persons could obtain judicial review only if specifically authorized by statute. The occasion was the Fulbright Amendment to the Defense Production Act Amendments, 1952, Section 301, 66 Stat. 308, 41 U. S. C. 43a.

We have several times referred above (*supra*, pp. 48–49, 51, 102–103, 112, fn. 38) to *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, which held that a Government contractor has no standing to challenge administrative determinations under the Walsh-Healey Public Contracts Act of 1936. Certain members of Congress disagreed with some of the substantive interpretations of the statute by the Secretary of Labor. Congress, however, never amended the Act. In 1952, it was felt that the courts should be given an opportunity to determine whether the administrative practice complied with the statutory command (98 Cong. Rec. 6531). Review of these determinations at the suit of a contractor financially prejudiced by the administrative action would, of course, have been possible if Section 10 (a) actually authorized every adversely-affected person to challenge administrative action in the absence of a specific statutory permission. Congress felt that this was not the case, and that it was necessary to amend the Walsh-Healey Act by expressly permitting any person adversely affected or aggrieved by certain orders of the Secretary of Labor to seek judicial review within 90 days.[49]

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[49] For a decision interpreting this legislation, see *Mitchell* v. *Covington Mills*, 229 F. 2d 506 (C. A. D. C.), certiorari denied, 350 U. S. 1002, and in particular the concurring opinion of Danaher, J., relating to the standing problems raised even by

This incident shows that Congress itself interprets Section 10 (a) as not conferring, in itself, standing to challenge administrative action upon anyone "adversely affected or aggrieved" thereby, but as restating the existing law, as set forth *supra*, pp. 101–107, 111–112. The Court of Appeals for the District of Columbia Circuit has come to the same conclusion. *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924, 932–934, certiorari denied, 350 U. S. 884; *Benson* v. *Schofield*, 236 F. 2d 719, 722–723, certiorari denied, 352 U. S. 976.[50]

3. *Respondents have no standing because the Canal Zone Code does not establish a statutory review procedure for the benefit of persons adversely affected or aggrieved, and they have not suffered a legal wrong.*

Admittedly, the Canal Zone Code does not provide any special statutory review proceeding. Respondents thus have standing to challenge the legality of petitioner's administrative action only if their financial interest in having the Canal tolls computed according to the statutory formula rises to the dignity of a "legal right". This it does not do.

a. *Respondents do not have standing by virtue of a user's right to reparations for unreasonable charges exacted by a public utility.* One of the touchstones suggested for the solution of the issue of standing in individual cases is whether the litigant would have

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this type of specific legislation. See, also, *Ruth Elkhorn Coals, Inc.* v. *Mitchell*, 248 F. 2d 635 (C. A. D. C.), pending on petition for a writ of certiorari, No. 704, this Term.

[50] See Carrow, *Types of Judicial Relief from Administrative Action*, 58 Columbia Law Rev. 1, 4 (Jan. 1958).

a remedy against a private person who took similar action. On this view, the question is whether, in analogous circumstances, the user of a privately-owned canal could compel its owner to initiate proceedings designed to lower its tolls for the future.

(*1*). At common law, a public utility had the duty not to make unreasonable charges. This duty was enforceable through damage actions or reparation proceedings in which the user could recover the excess of the amount actually paid over the reasonable rate. *Interstate Commerce Commission* v. *Baltimore & Ohio Railroad*, 145 U. S. 263, 275; *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 436. But we know of no decision which authorized a user to bring mandamus proceedings or otherwise to compel the utility to lower its rates prospectively.

(*2*). The crux of this case, however, is not that petitioner charges an unreasonable rate, but that it fails to compute the rate according to a statutory formula which is far lower than the "reasonable" rate. It is established that the enactment of such a statutory procedure for the determination of rates supersedes the common law remedy of reparation and damages, and that, unless the statute gives a right of action to all affected persons, a user has no standing. Respondents thus would not have a judicial remedy if petitioner were a private canal company.

(*i*). Respondents seek statutory, not reasonable, tolls. Significantly, the complaint does not ask that petitioner be ordered to prescribe reasonable tolls (R. 8). It alleges that the tolls charged by pe-

titioner are not computed according to law, the statutory toll formula, or the Comptroller General's Report for 1954 (R. 5–7). Respondents now seek to avoid this difficulty by claiming that the toll formula represents a statutory definition of what constitutes reasonable tolls in the common law sense (cf. Respondents' Brief in Opposition in No. 251, p. 5). This interpretation, however, is utterly at variance with the basic elements of a normal reasonable rate established by this Court. According to those tests, a reasonable rate permits the utility to recover all of its operating expenses, depreciation which includes allowances for wear and tear, inadequacy and obsolescences, and finally a reasonable return on the investment. *Lindheimer* v. *Illinois Telephone Co.*, 292 U. S. 151, 164, 167; *Federal Power Commission* v. *Hope Gas Co.*, 320 U. S. 591, 605. Respondents, in contrast, claim that the toll formula calls for the operation of the Canal at cost, without any allowances for a return on the investment and obsolescence.[51]

Again, the core of this litigation centers around respondents' contention that the deficit of the supporting business organizations is not recoverable through tolls. However, their main reliance in their complaint and their motion for summary judgment—the Comptroller General's Report (*supra*, pp. 7–8, fn. 8;

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[51] Canal Zone Code, Title 2, Section 253, *infra*, p. 156, which provides for the payment of dividends, indicates that the Canal was not supposed to be operated at cost. During the six years of its existence, petitioner has paid two dividends totalling $15,000,000 ($10,000,000 during the fiscal year of 1955 and $5,000,000 during the following fiscal year (H. Doc. 351, 84th Cong., 2d Sess., p. 5, see also H. Doc. 99, 85th Cong., 1st Sess., p. 5.))

p. 23)—takes the position that this deficit constitutes a legitimate expense in the operation of the Canal; and the Comptroller General has recommended strongly that the toll formula be amended to include this item (*supra*, pp. 19–20). A rate which does not permit the recovery of a legitimate business expense is obviously not a "reasonable rate", as that term is commonly understood.

(*ii*). As we have just pointed out, respondents' claim is not based upon petitioner's alleged violation of a common law duty to charge no more than a reasonable rate, but on the theory that petitioner violated the provisions of the statute determining its tolls. Such a statute supersedes the common law right for reparations unless the latter has been preserved expressly, as *e. g.*, in Section 22 of the Interstate Commerce Act (49 U. S. C. 22). *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 446–447. Respondents therefore cannot rely on any alleged common law right to sue.

In addition, statutes of this type do not, unless express provision is made, give a user the right to sue. Such statutes determining the rates which a public utility may charge are enacted, not for the specific benefit of the user, but on account of the impact of excessive charges on the public as a whole. The rate determination takes into consideration not only the interests of the utility and the user, but also those of competing facilities, and of the competitors of users.[52] The duty of the utility to comply

[52] Cf. the statement by this Court that regulatory legislation is designed to establish public, not private, rights. *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 362.

with a rate-determining statute is not owed to its users but to the public at large. The user's interest in the proper administration of a rate-determining statute does not differ from that of the general public (see *supra*, p. 101), and is not sufficient to confer standing upon him unless the statute does so expressly. *City of Atlanta* v. *Ickes*, 308 U. S. 517; *Stark* v. *Wickard*, 321 U. S. 288, 319 (dissenting opinion),[53] *Louisiana* v. *McAdoo*, 234 U. S. 627, 631–632;[54] cf. *Associated Industries* v. *Ickes*, 134 F. 2d 694, 702 (C. A. 2), vacated as moot, 320 U. S. 707; *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924, 934, fn. 20 (C. A. D. C.), certiorari denied, 350 U. S. 884. *United States* v. *Public Utilities Commission*, 151 F. 2d 609 (C. A. D. C.), cited by the court below,[55] recognizes a consumer's standing to challenge a rate determination by a public utility commission, but

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[53] The majority opinion did not contest this statement but held that the plaintiff had standing because a specific legal interest, going beyond that of a user or consumer, had been invaded; cf. 321 U. S. at 305, 308–310.

[54] A consumer has no standing to complain of excessive customs levies.

[55] Cf. R. 256, fn. 36. The other two cases cited in that note are likewise not of any assistance to respondents. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, states that the user's common law right to reparations is superseded by legislation determining the rates to be charged by the utility (*supra*, p. 123). *Richman* v. *Consolidated Gas Co. of New York*, 114 App. Div. 216, affirmed, 186 N. Y. 209, involves standing under New York law, and, hence, has no bearing on the special standing problems under the Federal Constitution. *Tyler* v. *Judges of the Court of Registration*, 179 U. S. 405, 410; *Coleman* v. *Miller*, 307 U. S. 433, 466 (concurring opinion); *Doremus* v. *Board of Education*, 342 U. S. 429, 432–434.

only because the statute (D. C. Code § 43–705) in terms conferred this right on any person "affected". It has been held in cases closely analogous to this litigation that a passenger and an employee of a privately-owned ferryboat route lack standing to complain of its abandonment, and that users of a county bridge lack any right "peculiar to themselves" which would enable them to complain of the legality of the tolls collected for its crossing. *Johnson* v. *Chesapeake & O. Ry. Co.*, 188 F. 2d 458 (C. A. 4), certiorari denied, 342 U. S. 833; *Lawless* v. *Duval County*, 6 F. Supp. 303 (S. D. Fla., statutory court). Under this line of decisions, respondents could not challenge the legality of the canal tolls, even if petitioner were a wholly private corporation.

b. *There are no statutory or treaty provisions designed to confer standing upon respondents.* As we have just developed, a rate-determining statute usually is designed to serve the interests of the public at large, not to create any specific enforceable rights in those who would benefit from its proper enforcement. Occasionally, however, this Court has found legislation establishing a direct substantive right in the beneficiary of a regulatory statute. The most famous instance is the *Chicago Junction Case*, 264 U. S. 258, 266–267, which held that the Interstate Commerce Act had conferred upon the competitors of a railroad a special interest, capable of judicial enforcement. Statutes of this type are rare,[56] and respondents can-

[56] Cf. the discussion of the *Chicago Junction Case* in *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 483–484.

not show any statute or treaty designed to confer upon them any such specific enforceable rights.

(*1*). The Act of 1950 certainly did not confer upon respondents any specific right to have the tolls computed according to the formula of Sections 411 and 412. We have pointed out in detail that the 1950 Act is legislation concerning the administration of public property (*supra*, pp. 45–49). Such statutes envisage enforcement by the political branches of the Government (*supra*, pp. 47–49). Indeed, they have been described not as ordinary legislation but as "mere rules prescribed by an owner of property * * *". *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 474, *supra*, p. 48. The usual purpose to be inferred from such rules is that the owner confers upon the users of his property privileges which are revocable at will. He does not normally intend to create any vested rights.

The nature of the legal relations created by legislation dealing with the management of Government property and with Government contracts has been analysed in *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113.[57] The Court held that such statutes constitute "a self-imposed restraint for violation of which the Government—but not private litigants—can complain" and that it "was not intended to be a bestowal of litigable rights upon those desirous of selling to the Gov-

[57] For the continued vitality of the considerations underlying the *Perkins* case, see *supra*, p. 119. It will be remembered that this case was among those cited to Congress at the time of the enactment of the Administrative Procedure Act as having "an important bearing" on the standing problem (*supra*, pp. 111–112, 115). Cf. *Overstreet* v. *North Shore Corporation*, 318 U. S. 125, 132, *supra*, pp. 116–117.

ernment"[58] (310 U. S. at 127). The duties of the Government officials in this area are "owing to the Government and to no one else" (310 U. S. at 126); their "responsibility is to superior executive and legislative authority" (310 U. S. at 129).[59] Statutes dealing with the administration of public property are not designed to create any specific rights in the potential users. Their interest in the proper execution of those laws is not distinguished from that of the general public (310 U. S. at p. 125), and hence, is insufficient to confer standing to sue (*supra*, pp. 101–102).

The general rule negativing the purpose to create enforceable legal rights in this area is re-enforced by the particular statutory plan for the Canal tolls. We have first the "essential" presidential power to modify the computation of the tolls based upon the formula (*supra*, pp. 55; 66–67). Similarly, it was anticipated that Congress would authorize or require departures from the statutory toll formula if the circumstances necessitated such action;[60] this double reservation of the power of modifying the tolls suggests that Congress never intended to confer upon the users of the Canal any rights which might be enforceable in judicial proceedings.

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[58] Or, in this case, "those desirous of using Government property".

[59] We have shown (*supra*, pp. 49–53) the effectiveness of petitioner's supervision by the President and Congress.

[60] *Supra*, pp. 55–56 and see *Authorization and Provision for the Maintenance and Operation of the Panama Canal*, Hearings before the Subcommittee on the Panama Canal of the Committee on Merchant Marine and Fisheries, House of Representatives, 81st Cong., 2d Sess., on H. R. 8677, pp. 49–50, see also District Court Opinion, fn. 20a, R. 223–224.

Furthermore, if Congress had intended to provide for judicial review of petitioner's rate determinations, it would have established administrative proceedings following the well established pattern, *i. é.*, for a hearing prior to the rate determination,[61] in which all interested parties can submit evidence, and for statutory review proceedings (following petitioner's decision) by any party adversely affected. The total absence of any of the now familiar administrative and review procedures which would permit the adequate representation of the various conflicting interests indicates that Congress did not intend to create in respondents any rights which might be vindicated in court.

And, as we have already suggested (*supra*, pp. 103–104), if the statute were construed as conferring specific legal rights, respondents would not be the only ones who could challenge petitioner's administration of the statute. The transcontinental railroads, whose interests were carefully respected by Congress,[62] could complain that the tolls were too low. Shippers on transcontinental railroads could assert that if the Canal tolls were lowered, the railroads would be com-

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[61] Section 411 calls for a hearing *following* the prescribing of new tolls by petitioner.

[62] See *supra*, pp. 66–67. Congress eliminated a $1.00 ceiling on the toll formula to which the railroads had objected. See, *e. g.*, *Maintenance and Operation of the Panama Canal*, Hearing before a Subcommittee of the Committee on Armed Services, United States Senate, 81st Cong., 2d Sess. on H. R. 8677, pp. 27–29 (R. 142–144); S. Rept. 2531, 81st Cong., 2d Sess., p. 4 (R. 165).

pelled to lower their rates. Probably, none of these competing interests would ever concede that the tolls complied with the statutory formula at any given moment. This consideration "places in bold relief" the potentialities which necessarily arise if legislation of this type is construed as conferring judicially enforceable rights (cf. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, at 131, see also *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 480–481; and *supra*, pp. 103–107).

(*2*). Respondents have no standing to sue by virtue of the Hay-Pauncefote Treaty. Pursuant to Art. III of the Hay-Pauncefote Treaty, 32 Stat. (Pt. 2) 1904, *supra*, pp. 6–7, the United States agreed with the United Kingdom that the conditions and charges for the Panama Canal "shall be just and equitable". We have shown (*supra*, pp. 121–123) that respondents' complaint is not that the toll charges are unreasonable, unjust or inequitable, but merely that they do not comply with respondents' interpretation of a statutory formula—which would give them a windfall and would result in an unintended substantial annual subsidy of the Canal operations by the American taxpayer (*supra*, pp. 19–20).

More fundamental, however, is the consideration that treaty obligations assumed by the United States do not confer any specific rights upon American citizens.[63] Basically, the rules of international law are binding upon, and create rights between sovereign na-

[63] According to the allegations of the complaint, respondents are all corporations organized under the laws of states of the United States (Complaint, par. 1, R. 4).

tions. Occasionally, a treaty provides that the obligations assumed by one country run directly to the citizens of the other contracting power.[64] A state, however, does not assume any obligation towards its own citizens when it enters into a treaty with a foreign country. This Court has held that "International law * * * [is] concerned with international rights and duties and not with domestic rights and duties", and that an American citizen is "not in a position to invoke the rights of other governments or of the nationals of other countries." *Skiriotes* v. *Florida,* 313 U. S. 69, 72–74.

Thus, the only obligations of the United States created by the Hay-Pauncefote Treaty are international treaty rights running in favor of the United Kingdom. This country has always taken the position that the Treaty conferred rights only on the two signatory powers.[65] The reference to the Hay-Pauncefote Treaty in Section 412 (d) of the Canal Zone Code (*infra,* p. 169) obviously means no more than that, in prescribing tolls, petitioner has to respect the international duties owed to the United Kingdom. There is no indication of an intent to convert this international obligation into a specific duty owed by the Canal Company to citizens of the United States. Such an

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[64] Borchard, *Diplomatic Protection of Citizens Abroad,* 18; Oppenheim's *International Law* (Seventh Ed. by Lauterpacht), Vol. I, Secs. 13a, 289, 520.

[65] See the statement of Senator Root on the floor of the Senate, 51 Cong. Rec. 8955, and see Communication of Secretary of State Hughes to President Harding, Hackworth, *Digest of International Law,* Vol. V, pp. 221–222; Hyde, *International Law* (2d Rev. Ed.), Vol. II, Section 529A, fn. 9.

unusual grant could be found only upon the basis of far more convincing evidence than exists here.

II

THE COURT OF APPEALS ERRED IN AWARDING SUMMARY JUDGMENT TO RESPONDENTS

Assuming, for the sake of argument, that the courts had jurisdiction to entertain these proceedings, the court below erred in directing summary judgment for respondents. Respondents' motion for summary judgment was stayed, and petitioner had been excused from answering it. Any disposition of that motion was premature. On the other hand, we submit that if the court below felt that it had jurisdiction, it should have dismissed the proceedings on the merits because respondents cannot succeed.

A. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT

1. *The posture of the case.* The complaint in this case was filed on September 13, 1955 (R. 1). Petitioner's time to file its answer expired on November 12, 1955 (Rule 12 (a), Federal Rules of Civil Procedure). On October 28, 1955, *i. e.*, before the time to answer had expired, respondents obtained an order to show cause for summary judgment (R. 10). The papers supporting this order to show cause constituted a heavy volume containing some 60 pages of affidavits and over 500 pages of congressional and administrative documents, hearings, and reports.[66] The

[66] The papers supporting the order to show cause have been printed only in part. R. 10–185.

affidavit in support of the order to show cause itself conceded that the matter was not suitable for summary disposition. It pointed out that, under the Federal Rules of Civil Procedure (Rule 6d), petitioner's affidavits in opposition would be due only the day before the hearing and that, in view of the complexity of the case, respondents needed more than the day contemplated by the Rules to prepare its reply affidavits and brief (R. 38).

In spite of the representation implicit in the motion for summary judgment that the case did not present any genuine issue of fact, respondents, on November 10, 1955, initiated extensive discovery proceedings. They filed requests for admissions, interrogatories, as well as notices of deposition, and served subpoenas *duces tecum* on the Comptroller General and on William Newman, an official in the General Accounting Office (R. 1–2, 209–210, 212–213).[67]

On December 16, 1955, petitioner moved to dismiss the complaint for lack of jurisdiction and for failure to join an indispensable party (R. 185). This motion was supported by a brief affidavit (R. 186–195). Petitioner took the position that orderly procedure required the question of jurisdiction to be settled before the case proceeded any further on the merits (R. 197). It moved to stay the discovery proceedings and the motion for summary judgment so that it would be

[67] The reason given for these discovery proceedings was respondents' belief that petitioner's General Counsel had disagreed with petitioner's management on the interpretation of Sections 411 and 412, and their desire to obtain evidence of this internal disagreement (R. 203).

spared the monumental job of answering the weighty document filed by respondents with their summary judgment motion, unless it appeared that the court had jurisdiction (R. 196–197, 205).

The District Court granted the stay motions for the very purpose of obviating the need to answer the complex motion for summary judgment while the jurisdictional issue remained undetermined (R. 205, 207–210, 211–213). It specifically stated that upon the hearing of the motion to dismiss:

> * * * the only answer that you [the parties] can get is either (1) we can't even hear it, or (2) we can hear it; and if we conclude we can hear it, there will be a fresh slate and a fresh start on who is right and who is wrong. [R. 202.]

Respondents' motion for summary judgment was subsequently marked off the calendar (R. 185).

2. *Since respondents' motion for summary judgment was not before the District Court, the Court of Appeals erred in directing entry of summary judgment for respondents.* The direction of summary judgment by the Court of Appeals disregarded the precepts of this Court that issues of public moment should not be decided on affidavits in proceedings which do not permit the probing of the evidence by judge and opposing counsel, and which lack "the safeguards of critical scrutiny of the facts", *Eccles* v. *Peoples Bank,* 333 U. S. 426, 434. And apart from this fundamental consideration that courts should not pass on issues of the type here involved "without the

fullest disclosure of all material facts",[68] the Court of Appeals, by awarding summary judgment, passed on a motion which was not before it, and deprived petitioner of all opportunity to answer that motion.

The ruling of the District Court was expressly limited to petitioner's motion to dismiss for lack of jurisdiction (R. 202, 208, 212–213). As we have shown (*supra*, p. 133), the District Court specifically denied any intention of passing on respondents' motion for summary judgment; accordingly, it stayed that motion, excused petitioner from answering it, and marked it off the calendar. The Court of Appeals thus granted a motion which had not been considered by the District Court, and which petitioner had not answered, in reliance upon the District Court's rulings. This constituted fundamental procedural error. *Fountain* v. *Filson*, 336 U. S. 681, 683; *Kaku Nagano* v. *McGrath*, 187 F. 2d 759, 768 (C. A. 7), affirmed, 342 U. S. 916.

It will not do to argue that petitioner's motion to dismiss actually constituted a motion for summary judgment because it was supported by an affidavit. First, motions to dismiss under Rule 12 (b) (1)–(5) and (7), Federal Rules of Civil Procedure, always could, and usually have to, be made in the form of a speaking motion. The provision of Rule 12 (b) which transforms a motion to dismiss, supported by an affidavit, into a motion for summary judgment is limited in terms to motions under Rule 12 (b) (6), the old speaking demurrer. Moore, *Federal Practice* (2d

[68] *Chicago, etc., Ry. Co.* v. *Wellman*, 143 U. S. 339, 345–346.

Ed.), Vol. 2, Section 12.09, pp. 2247–2257. Second, even if the Court of Appeals felt that the District Court had erred in not treating the two motions as cross-motions for summary judgment, it still lacked power to award summary judgment to respondent without giving petitioner an opportunity to dispute the facts material to that motion. *Fountain* v. *Filson,* 336 U. S. 681, 683.

B. IF THE COURTS HAVE JURISDICTION OVER THE SUBJECT MATTER OF THIS ACTION, THE COMPLAINT SHOULD BE DISMISSED BECAUSE RESPONDENTS CANNOT SUCCEED ON THE MERITS

Even if this Court should conclude that the courts have jurisdiction over the subject matter, the proper disposition of this case would be to dismiss it on the merits, rather than to remand it to the District Court for further proceedings.

The ultimate issue upon which respondents' case turns is whether the deficit of the supporting business activities of the Canal constitutes a cost element to be considered in the computation of the Canal tolls. If this question is answered in the affirmative, respondents cannot prevail on the merits, and a remand of the case to the District Court would constitute an idle gesture. Where a reviewing court finds an insurmountable objection to the maintenance of the action, it will dismiss, rather than remand, the proceedings and terminate the litigation. *Deckert* v. *Independence Shares Corporation,* 311 U. S. 282, 287; *Myers* v. *Bethlehem Corp.,* 303 U. S. 41, 52–53 and the authorities there cited.

Respondents cannot establish that the deficit of the supporting business activities does not constitute

a cost element recoverable through Canal tolls. In the part of this brief which dealt with the mandamus jurisdiction of the courts, our burden was merely to show that petitioner's interpretation of the statute was a plausible and reasonable one (*supra*, pp. 84–89). We submit that we have gone farther and established there that petitioner's reading of the statute is correct. However, if there be any question, it is apparent that Congress has ratified the administrative interpretation of the statute.

Congress has been fully advised of the administrative interpretation of Sections 411 and 412 by the Panama Canal Company. Petitioner explained its position to Congress even before May 16, 1955, the day the Comptroller General's Audit Report for 1954 was filed with Congress.[69] Subsequently, a spokesman for respondents presented their case before a congressional committee.[70] Again, in 1956, when advised

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[69] Cf. *Operations of the Panama Canal Company, etc.*, Hearings before Subcommittee No. 3, Panama Canal, of the Committee on Merchant Marine and Fisheries, House of Representatives, 83d Cong., 2d Sess., June–July, 1954, pp. 8–10; *Study of the Operations of the Panama Canal Company, etc.*, Hearings before the Committee on Merchant Marine and Fisheries, House of Representatives, 84th Cong., 1st Sess., March 29, 30, and 31, 1955, p. 103.

[70] *Changes in the Administration of the Panama Canal Company*, Hearings before the Subcommittee on Panama Canal of the Committee on Merchant Marine and Fisheries, House of Representatives, 84th Cong., 1st Sess., on H. R. 6917, etc., pp. 6, 22–23. For the petitioner's reply, see pp. 160–161. Petitioner's position was submitted to the corresponding Senate committee in *Panama Canal* (*Changes in Administration*), Hearings before the Subcommittee of the Committee on Interstate and Foreign Commerce, United States Senate, 84th Cong., 2d Sess. on S. 2167, pp. 68–70, 90–92.

of the pendency of this litigation, one member of the House Committee of Appropriations (Representative Thomas) took the position that the shipping interests were fighting a preventive war by suing for $27 million while they should be paying $50 million more; another (Representative Miller) considered that it was unrealistic that the Canal rates had not been increased since 1937 [71] and that they were lower than those charged for the Suez Canal.[72]

In view of the close scrutiny by Congress over petitioner's administration of the Canal, and of its interpretation of the toll formula,[73] the enactment of three appropriation acts approving petitioner's budget,[74] after having been advised of this controversy, constitutes congressional ratification of petitioner's in-

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[71] *Department of Commerce and Related Agencies Appropriations for 1957*, Hearings before a Subcommittee of the Committee on Appropriations, House of Representatives, 84th Cong., 2d Sess., pp. 691, 693, 696–697. See also the remarks of Senator Ellender on the floor of the Senate, 101 Cong. Rec. 7743, and the congressional inquiry into the alleged inadequacy of the canal tolls, *supra*, pp. 17–18.

[72] The Suez Canal does not require expensive lock operations.

[73] *Supra*, pp. 17–18, 50, 53, 55–56. Cf. *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535, 544–545, fn. 12; *United States* v. *Allen-Bradley Co.*, 352 U. S. 306, 310.

[74] The Comptroller General's Report for 1954 was transmitted to Congress on May 16, 1955 (R. 40). Since then, Congress has approved the Department of Commerce and Related Agencies Appropriations Acts for 1956, 1957 and 1958 which include petitioner's budgets based upon its interpretation of the statute. 69 Stat. 235–237; 70 Stat. 322–324; 71 Stat. 78.

terpretation of the toll formula.[75] *Brooks* v. *Dewar*, 313 U. S. 354, 361; *Fleming* v. *Mohawk Co.*, 331 U. S. 111, 116; *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535, 544–545; see also *United States* v. *Allen-Bradley Co.*, 352 U. S. 306, 310–311 and *United States* v. *Korpan*, 354 U. S. 271, 276–277.[76] In these circumstances, a remand to the District Court for further proceedings would constitute a "[p]lain waste of time, effort and money * * *".[77]

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[75] This Court can take judicial notice of these facts, established by legislative documents, such as congressional hearings, reports, and statements made on the floor of the legislature. *Arizona* v. *California*, 283 U. S. 423, 453, fn. 3; *United States* v. *McFarland*, 15 F. 2d 823, 833 (C. A. 4), certiorari granted, 273 U. S. 688, revoked, 275 U. S. 485; *Louisville Gas & Electric Co.* v. *Federal Power Commission*, 129 F. 2d 126, 134 (C. A. 6), certiorari denied, 318 U. S. 761; *Porter* v. *Murray*, 156 F. 2d 781, 786 (C. A. 1), certiorari granted, 329 U. S. 705, dismissed *sub nom. Murray* v. *Fleming*, on motion of petitioner's counsel, 330 U. S. 804; *Osage Nation* v. *United States*, 119 C. Cls. 592, 633, certiorari denied, 342 U. S. 896. These facts may be noted judicially although many of them occurred after the hearing in the District Court had been closed. *Savannah River Electric Co.* v. *Federal Power Commission*, 164 F. 2d 408, 410 (C. A. 4).

[76] See also the rulings to the effect that the courts generally refuse to repudiate an administrative interpretation of a statute which has clearly been brought to the attention of Congress and which Congress, although urged to do so, has refused to correct. *Alstate Construction Co.* v. *Durkin*, 345 U. S. 13, 17; *Mitchell* v. *Covington Mills*, 229 F. 2d 506, 509 (C. A. D. C.), certiorari denied, 350 U. S. 1002; *Ruth Elkhorn Coals, Inc.* v. *Mitchell*, 248 F. 2d 635 (C. A. D. C.), pending on petition for a writ of certiorari, No. 704, this Term.

[77] *Benson* v. *Schofield*, 236 F. 2d 719, 721 (C. A. D. C.), certiorari denied, 352 U. S. 976.

III

THE DISTRICT COURT AND THE COURT OF APPEALS BOTH HELD CORRECTLY THAT THEY LACKED JURISDICTION TO THE EXTENT THAT THE COMPLAINT SEEKS TO RECOVER ANY ALLEGEDLY EXCESSIVE TOLLS COLLECTED IN THE PAST

Respondents' complaint seeks to accomplish two things. First, to compel the lowering of the Canal tolls prospectively, and, second, to obtain a refund on the tolls paid in the past to the extent that they exceeded the charges payable under the tolls formula, as respondents construe that formula. For this purpose, respondents ask that the court impress a trust upon the tolls collected in excess of the alleged statutory rate and that it award a damage judgment (R. 9). Both courts below have dismissed this portion of the complaint for lack of jurisdiction. We agree, of course, with this disposition of this aspect of the case, which is the subject of the cross-petition for certiorari in No. 252.

A. Respondents base their refund claims on the common law rule that a user of a public utility from whom an unreasonable charge has been exacted may recover the excess over the reasonable charge. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 436; *Arizona Grocery* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 284 U. S. 370, 383. This analogy fails for a number of reasons.

First, petitioner is not a mere public utility but an agency and instrumentality of the United States (Canal Zone Code, Section 245, *infra*, p. 164). Hence,

any duty to charge reasonable rates is owed to petitioner's superior executive and legislative authority (*supra*, pp. 126–127), not to the Canal users. This consideration eliminates the very basis of the common law remedy predicated upon a duty owed by the utility to the user.

Second, respondents' complaint is based upon the charge that tolls collected by petitioner do not comply with the statutory formula, not that they are unreasonable. As we have shown (*supra*, pp. 121–123, the statutory rate contended for by respondents is far below the figure which petitioner could charge as a reasonable rate. Respondents thus seek to obtain a statutory benefit, not simply a "reasonable" rate. In these circumstances they may not escape the terms of the statute. *Z. & F. Assets Corp.* v. *Hall*, 311 U. S. 470, 486. In particular, they cannot circumvent, under the guise of a damage suit, the provisions of Section 411 pursuant to which the toll rates continue in effect until changed by the President as provided in that section, and require that changes in toll rates be subject to, and take effect upon the approval of, the President whose action in such matters is final and conclusive. *Supra*, pp. 3–4, 16, 61–70.

What respondents actually seek to obtain is a judicial, retrospective, change of the rates in spite of the statutory command that only the President may alter them, and even he only prospectively. The President plainly is an indispensable party to any attempt to interfere with his exclusive statutory right to change the Canal tolls. Since he is not subject to

the jurisdiction of the courts (*Mississippi* v. *Johnson*, 4 Wall. 475), the complaint must be dismissed for nonjoinder of an indispensable party over whom jurisdiction cannot be obtained.[75] *Mine Safety Appliances Co.* v. *Forrestal*, 326 U. S. 371, 375; *Minnesota* v. *United States*, 305 U. S. 382; *Louisiana* v. *Garfield*, 211 U. S. 70; see also Moore, *Federal Practice* (2d Ed.), Vol. 3, Section 19.15.

Moreover, where the regulation of a business has been entrusted to an administrative agency, the jurisdiction of the courts is limited to the correction of errors of law. When the court determines that such an error has been committed its functions end, and the matter should be remanded to the agency for further consideration. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 141–146; *Federal Power Commission* v. *Idaho Power Co.*, 344 U. S. 17, 20–21; *Associated Industries* v. *Ickes*, 134 F. 2d 694, 700, fn. 5 (C. A. 2), vacated as moot, 320 U. S. 707; *Commissioner of Internal Revenue* v. *National Lead Co.*, 230 F. 2d 161, 165 (C. A. 2), affirmed on other grounds, 352 U. S. 313.

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[75] Prayer No. 6 of the complaint (R. 9) asks that the court impress a trust upon the alleged excess tolls. To the extent that respondents seek to follow the trust res into the United States Treasury, especially with respect to the $15,000,000 paid in dividends (*supra*, p. 122, fn. 51), the suit is "essentially one designed to reach money which the federal government owns. In these circumstances the United States is an indispensable party, *Minnesota* v. *United States*, 305 U. S. 382, 385 * * *". *Mine Safety Appliances Co.* v. *Forrestal*, 326 U. S. 371, 375; *Kennecott Copper Corp.* v. *State Tax Commission*, 327 U. S. 573, 577; *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752, 755.

Accordingly, where an administrative procedure has been established for the determination of rates, rate-making ceases to be a function of the courts—assuming they ever had this quasi-legislative power—and may not be attempted either directly or indirectly. *Newton* v. *Consolidated Gas Co.*, 258 U. S. 165, 177; cf. *Central Kentucky, etc., Co.* v. *Railroad Commission of Kentucky*, 290 U. S. 264, 271; *Connett* v. *City of Jerseyville*, 110 F. 2d 1015, 1018 (C. A. 7).

The computation of damages for allegedly excessive rates collected in the past would require the determination by the court of the rates which should have been in effect in the past. Such a calculation is like a retroactive rate determination, and it has long been recognized that, where an administrative agency has been entrusted with the determination of rates, the courts cannot in reparation proceedings independently determine what the proper rate should have been.[79] Even where, as under the Interstate Commerce Act, the courts and the regulatory commission have concurrent jurisdiction to grant reparations, the courts lack authority to maintain such proceedings to the extent that they are predicated upon the unreasonableness of the rate. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *United States* v. *Interstate Commerce Commission*, 337 U. S. 426, 437; *United States* v. *Western Pac. R. Co.*, 352

[79] Cf. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 446–447, indicating that the enactment of a regulatory statute abolishes the common-law action for reparations to the extent that it is inconsistent with the regulatory plan. See *supra*, p. 123.

U. S. 59, 62–70. In this case, therefore, the courts have no jurisdiction to determine the damages caused by the alleged overcharge.

Reference to the administrative agency for a determination of what the proper rate would have been would be of no avail, because the statutory plan does not provide for reparations. Section 411 directs expressly that the toll rate remains in effect until changed by the President (cf. p. 140). This circumstance that reference to the agency would be fruitless, however, does not vest in the courts the power to award reparations themselves. Confronted with the same problem in a case arising under the Federal Power Act, this Court held in *Montana-Dakota Co.* v. *Public Service Commission*, 341 U. S. 246, 253–255, that it could neither grant reparations itself, nor refer the matter to the Federal Power Commission. The Court stated:

> Under such circumstances, we conclude that, since the case involves only issues which a federal court cannot decide and can only refer to a body which also would have no independent jurisdiction to decide, it must decline the case forthrightly rather than resort to such improvisation [341 U. S. at 255].

In reaching this conclusion, the court was influenced by the circumstance, also present here, that the award of reparations to anyone except the ultimate consumer may result in a windfall where the excessive charges have already been passed on to the user's customers, and there is no appropriate mechanism for passing on the recovery (341 U. S. at 254). Since respond-

ents are carriers whose published tariffs necessarily reflected the Canal tolls collected, they presumably have recouped themselves, and there is no need to award a second recovery to them.[80]

B. Assuming, however, that the courts would have jurisdiction to award reparations, the determination of the damages allegedly suffered by respondents involves the determination of the toll rates which (a) petitioner should have computed under the toll formula and (b) the President would have approved. This computation involves elements which are completely outside the judicial domain.

As we have pointed out in detail (*supra*, pp. 80–81), the statutory toll formula[81] contains a number of discretionary elements such as "as nearly as practicable"; an "appropriate share", "substantial weight"; and ex-

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[80] Congress seems to be fully aware of this consideration: cf. the discussion of this law suit in *Changes in the Administration of the Panama Canal Company*, Hearings before the Subcommittee on Panama Canal of the Committee on Merchant Marine and Fisheries, House of Representatives, 84th Cong., 1st Sess., on H. R. 6917, etc., December 5, 1955, pp. 21–22.

[81] "SECTION 412 (b). Tolls shall be prescribed at a rate or rates calculated to cover, as *nearly as practicable*, all costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto, *including, interest and depreciation*, and an *appropriate* share of the net costs of operation of the agency known as the Canal Zone Government. In the determination of such *appropriate* share, *substantial weight* shall be given to the *ratio* of the *estimated* gross revenues from tolls to the *estimated* total gross revenues of the said corporation exclusive of the cost of commodities resold, and exclusive of revenues arising from transactions within the said corporation or from transactions with the Canal Zone Government". (Emphasis added.)

tremely technical accounting problems such as "the ratio of the estimated gross revenues from tolls to the estimated total gross revenues of the said corporation exclusive of the cost of commodities resold," etc. The court would also have to determine the time when petitioner should have put the new rates into effect. The court below suggested that this should have been done when the petitioner's valuation process had been approved by the Bureau of the Budget [82] (R. 249). Actually, this approval was obtained only on September 9, 1957, *i. e.*, after the Court of Appeals had handed down its decision. See Appendix, *infra*, pp. 180–181.

A judicial computation of tolls complying "as nearly as possible" with the statutory formula would not represent the proper measure of damages. The tolls have to be approved by the President, and he has to take into account matters of national transportation policy, foreign relations, local and world wide trade, and national defense. *Supra*, pp. 65–70. As we have indicated (*supra pp.* 68–70), the drastic reduction of the Canal tolls by 25%, contended for by respondents, might have such serious effects upon foreign relations, national transportation, as well as local and world commerce, that the President would not give his approval.

In computing respondents' damages, the courts thus would have to consider problems which in their very

[82] Canal Zone Code, Title 2, Section 246 (b), *infra*, pp. 149–150. The Comptroller General's Report for 1954 points out that it was impossible to evaluate petitioner's financial condition with any degree of certainty while this question remained undetermined, pp. 1–2 (R. 41–42).

nature are outside the realm of judicial cognizance. Apart from matters which are customarily assigned exclusively to the discretion of expert administrative bodies, they involve issues "wholly confided by our Constitution to the political departments of the government, Executive and Legislative. * * * They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility * * *". *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U. S. 103, 111.

CONCLUSION

For the above reasons, it is respectfully submitted that the judgment below should be reversed with costs to the extent that it reversed the judgment of the District Court, and that otherwise it be affirmed with costs.

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FEBRUARY 1958.

APPENDIX

I

1. The Act of June 29, 1948, 62 Stat. 1075, To Amend the Canal Zone Code for the Purpose of Incorporating the Panama Railroad Company, provides:

DECLARATION OF POLICY

SECTION 1. It is the policy of this Act, incorporating the Panama Railroad Company pursuant to section 304 (b) of the Government Corporation Control Act, approved December 6, 1945, for the purpose of conducting business activities incident to the care, maintenance, sanitation, operation, improvement, government, and protection of the Panama Canal and Canal Zone; to preserve the authority vested in the President by the Panama Canal Act of August 24, 1912; to govern and operate the Panama Canal and govern the Canal Zone, or cause them to be governed and operated, through a Governor of the Panama Canal and such other persons as he may deem competent to discharge the various duties connected with the care, maintenance, sanitation, operation, government, and protection of the Canal and Canal Zone. Also, it is the policy of this Act that the operations in the Canal Zone shall continue to be coordinated, through the President, in order that the responsibility for and authority over this important utility shall not be divided.

REINCORPORATION OF THE PANAMA RAILROAD COMPANY

SEC. 2. Chapter 12 of title 2 of the Canal Zone Code, approved June 19, 1934 (48 Stat.

1122), is amended by adding at the end of said chapter a new article numbered 3, embracing new sections 245 to 256 of said title 2, and reading as follows;

"ARTICLE 3—PANAMA RAILROAD COMPANY ACT

"245. CREATION, PURPOSE, OFFICES, AND RESIDENCE OF PANAMA RAILROAD COMPANY.—For the purpose of conducting business operations incident to the care, maintenance, sanitation, operation, improvement, government, and protection of the Panama Canal and the Canal Zone, there is hereby created, as an agency and instrumentality of the United States, and as an adjunct of the Panama Canal, a body corporate to be known as the Panama Railroad Company, hereinafter referred to as the 'corporation'. The principal offices of the corporation shall be in the city of New York, New York, and in the Canal Zone, but the corporation may establish agencies or branch offices in such other place or places as it may deem necessary or appropriate in the conduct of its business. Within the meaning of the laws of the United States relating to venue in civil actions, the corporation shall be deemed to be an inhabitant and resident both of the southern judicial district of New York and of the Canal Zone.

"246. INVESTMENT OF THE UNITED STATES.—(a) As of the beginning of business July 1, 1948, the corporation shall issue to the United States, and deliver to the Secretary of the Treasury, a receipt for $1 acknowledging the transfer to the corporation, under the provisions of section 251 of this title, of the net assets of the Panama Railroad Company, hereinafter referred to as the 'New York company', a corporation created by an act of the Legislature of the State of New York passed on April 7, 1849, as amended by an act of that legislature passed on April 12, 1855, and which is wholly

owned by the United States, and such receipt shall be evidence of the ownership of the corporation by the United States of America. In its capacity as owner of the corporation, the United States shall be represented by the President of the United States or such officer of the United States as may be designated by him, hereinafter referred to as the 'stockholder'.

"(b) The amount of the receipt (referred to in paragraph (a) above) shall be increased by subsequent additional direct investments of the United States, in excess of repayments to the Treasury and extraordinary expenditures and losses applicable as offsets to such investments under the provisions of paragraph (d) of this section, due to (1) funds advanced to the corporation from the Treasury within such appropriations by the Congress as may from time to time be made to meet increased capital needs, and (2) transfers to the corporation from other Government agencies (or, conversely, decreased by transfers from the corporation to other Government agencies), pursuant to applicable provisions of law, of business enterprises, facilities, appurtenances, and other assets, less liabilities assumed in connection with such transfers. Transfers of properties and other assets from or to other Government agencies under clause (2) above shall be at such appropriate amount or amounts as shall be agreed upon between the corporation and the agencies concerned and approved by the Director of the Bureau of the Budget, and in the determination thereof due consideration shall be given to the cost and probable earning power of the transferred assets, or usable value to the transferee if clearly less than cost, and adequate provisions made for depreciation of properties and equipment, obsolete or otherwise unusable inventories, and other reasonably determinable shrinkages in values, and, insofar as practicable, there shall

be excluded from such amount any portion of the value of the transferred property which is properly allocable to national defense. The board of directors shall certify to the Secretary of the Treasury the amount of each such transfer, the amount of any accumulated repayments to the Treasury or extraordinary expenditures or losses applicable as offsets to the amount of such transfer under the provisions of paragraph (d) of this section, and the effective date of the transfer.

"(c) In order to reimburse the Treasury, as nearly as possible, for the interest cost of the funds or other assets directly invested in the corporation, the corporation shall pay interest to the Treasury, at least annually, on the net direct investment of the Government in the corporation, as defined in paragraphs (a) and (b) of this section, and shown by the receipt described therein, at a rate or rates determined by the Secretary of the Treasury as required to reimburse the Treasury for its cost.

"(d) The corporation shall account for its surplus as follows: (1) The total net income from operations from and after 1904 (when the Government acquired control of the New York company), plus the undistributed net income prior to 1904, less (2) payments to the Treasury as dividends from and after 1904, not applied as offsets to direct capital contributions, as described below, and less (3) extraordinary expenditures or losses incurred through directives based on national policy and not related to the operations of the corporation, not reimbursed through specific appropriations by the Congress, and not applied as offsets to direct capital contributions as described below. The corporation shall not be required to pay interest to the Treasury on any part of its surplus, as above defined. Repayments to the Treasury as dividends shall be applicable as offsets against directly contributed capital, past

or future, in determining the base for the interest payments required under paragraph (c) of this section. Extraordinary expenditures and losses (as defined in clause 3 above), to the extent not reimbursed through specific appropriations, shall be considered as repayments to the Treasury analogous to dividends and similarly applicable as offsets against directly contributed capital.

"247. BOARD OF DIRECTORS.—The management of the corporation shall be vested in a board of directors consisting of not less than nine nor more than thirteen persons who shall be appointed by and hold office at the pleasure of the stockholder, or if he so elects, consisting of the stockholder and eight to twelve other persons: *Provided,* That the Governor of the Panama Canal shall be a director and president of the corporation. Before entering upon his duties, each of the directors so appointed shall take an oath faithfully to discharge the duties of his office. The directors shall receive no salary for their services on the board, but under regulations and in amounts prescribed by the board of directors, with the approval of the stockholder, may be paid by the corporation a reasonable per diem allowance in lieu of subsistence expenses in connection with attendance at meetings of the board or in connection with the time spent on special service of the corporation, and their traveling expenses to and from meetings or when upon such special service, without regard to the Subsistence Expense Act of 1926, as amended, or the Standardized Government Travel Regulations. Nothing contained in this article or in any other Act shall be construed to prevent the appointment and service, as a director, officer, or employee of the corporation, of any officer or employee of the United States. The directors, of whom a majority shall constitute a

quorum for the transaction of business, shall meet for organization purposes when and where called by the stockholder, and for subsequent meetings as provided by the bylaws.

"248. GENERAL POWERS OF CORPORATION.—The corporation shall have and may exercise the following general powers, in addition to those elsewhere conferred in this article:

"(a) Shall have perpetual succession in its corporate name, unless dissolved by Act of Congress.

"(b) May adopt, alter, and use a corporate seal, which shall be judicially noticed.

"(c) May adopt, amend, and repeal bylaws governing the conduct of its general business, and the performance of the powers and duties granted to or imposed upon it by law.

"(d) May sue and be sued in its corporate name.

"(e) May appoint such officers, agents, attorneys, and employees as may be necessary for the conduct of the business of the corporation, define their authority and duties, fix their compensation, delegate to them such of the powers of the corporation as may be necessary, require that such of them as it may designate be bonded, and fix the penalties and pay the premiums of such bonds. Persons employed by the corporation whose compensation is paid on any basis other than a per annum basis shall not be included in making computations pursuant to the provisions of section 607 of the Federal Employees Pay Act of 1945.

"(f) May enter into contracts, leases, agreements, or other transactions.

"(g) Shall have, in the payment of debts out of bankrupt estates, the priority of the United States.

"(h) May determine the character of and necessity for its obligations and expenditures and the manner in which they shall be incurred, allowed, and paid, and may incur, allow, and

pay the same, subject to pertinent provisions of law generally applicable to Government corporations.

"(i) May purchase, lease, or otherwise acquire, and hold, own, maintain, work, develop, sell, lease, exchange, convey, mortgage, or otherwise dispose of, and deal in, lands, leaseholds, and any interest, estate, or rights in real property, and any personal or mixed property, and any franchises, concessions, rights, licenses, or privileges necessary or appropriate for any of the purposes expressed in this article.

"249. SPECIFIC POWERS OF CORPORATION.—Subject to the provisions of the Government Corporation Control Act, the corporation shall have and may exercise the following specific powers, in addition to those elsewhere conferred in this article:

"(a) May construct, maintain, and operate a railroad across the Isthmus of Panama.

"(b) May construct or acquire vessels, and operate the same for transportation of passengers or freight and for other purposes.

"(c) May construct or acquire, establish, maintain, and operate docks, wharves, piers, harbor terminal facilities, shops, yards, marine railways, salvage and towing facilities, fuel-handling facilities, motor-transportation facilities, power systems, water systems, a telephone system, construction facilities, living quarters and other buildings, warehouses, storehouses, hotels, a printing plant, commissaries and manufacturing, processing or service facilities in connection therewith, laundries, dairy facilities, restaurants, amusement and recreational facilities, and other business enterprises, facilities, and appurtenances necessary or appropriate for the accomplishment of the purposes of this article.

"(d) May make or furnish sales, services, equipment, supplies, and materials, as contemplated by this article, to vessels, to agencies

of the Government of the United States, to employees of the Government of the United States, and to any other governments, agencies, persons, corporations, or associations eligible to make or receive such purchases, services, supplies, or materials under the laws prevailing at the time and the policies heretofore or hereafter adopted consistently with such laws.

"(e) May use the United States mails in the same manner and under the same conditions as the executive departments of the Federal Government.

"(f) May take such actions as may be necessary or appropriate to carry out the powers in this article or hereafter specifically conferred upon it: *Provided*, That the corporation shall undertake no new types of activities not included in the annual budget program prescribed by section 102 of the Government Corporation Control Act (except those which may be transferred to it under the provisions of section 246 (b) of this title): *And provided further*, That in the event an emergency is declared to exist by the board of directors during a period when the Congress is not in session (or by the Governor of the Panama Canal, acting in his capacity as president of the corporation, with the concurrence of as many of the directors as may be consulted without loss of time unreasonable in the circumstances), recommended appropriate action within the scope of this article may be undertaken. A report on such emergency activity shall be presented promptly to the Congress, when it reconvenes, for its approval and such action as it may deem necessary or desirable with respect to reimbursement through supplemental appropriation of funds to cover costs or losses arising from such emergency.

"250. SUBJECTION OF CORPORATION TO LAWS APPLICABLE TO NEW YORK COMPANY.—The cor-

poration shall, so far as consistent with the terms of this article, be deemed subject to all provisions in treaties and in Acts of the Congress of the United States, now in force, which relate or apply to the New York company; and shall have all the rights, privileges, and exemptions, and be subject to all the obligations, liabilities, and responsibilities applicable to the New York company under or by virtue of such provisions.

"251. TAKING OVER OF ASSETS AND LIABILITIES OF; AND DISSOLUTION OF, NEW YORK COMPANY; RELEASE OF UNITED STATES TREATY RIGHTS IN ASSETS.—The corporation is authorized and directed to take over the assets and assume the liabilities of the New York company as of July 1, 1948. To accomplish the transfer of such assets to, and the assumption of such liabilities by, the corporation, and to accomplish the dissolution of the New York company, the two corporations are authorized and directed to take, under the supervision of the stockholder, whatever action shall be determined to be appropriate and necessary, whether by agreement, transfer, merger, consolidation, dissolution, or otherwise. Effective upon the transfer of such assets and the assumption of such liabilities, there are hereby released and transferred to the corporation all the right, title, and interest, in and to such assets, which the United States now has or may hereafter acquire by virtue of the convention of November 18, 1903, between the United States and the Republic of Panama; and, specifically, there are hereby released to the corporation any and all reversionary rights of the United States in the lands of the corporation located in the cities of Panama and Colon, Republic of Panama.

"252. REIMBURSEMENT OF OTHER AGENCIES.—The corporation shall reimburse the Civil Service and Canal Zone Retirement and Disability Funds for Government contributions to the re-

tirement fund applicable to the corporation's employees, and the Employees' Compensation Fund, Bureau of Employees' Compensation, Federal Security Agency, for the benefit payments made to the corporation's employees, and shall also reimburse other Government agencies for any payments of a similar nature made on its behalf.

"253. PAYMENT OF EXCESS FUNDS INTO THE TREASURY.—The board of directors shall have the power and duty to appraise, at least annually, its necessary working capital requirements, together with reasonable foreseeable requirements for authorized plant replacement and expansion, and to pay into the Treasury as dividends the amount of funds in excess thereof. Such dividends shall be treated by the Treasury as miscellaneous receipts, but shall be treated on the books of the corporation as applicable to reduction of past or future direct Government capital contributions (as provided in section 246 (d) of this title) in determining the base for interest payments required under section 246 (c).

"254. EMERGENCY FUND.—The corporation may borrow from a fund to be established and maintained in the Treasury, for any authorized purposes of the corporation, but for limited periods only, sums of money not to exceed a total of $10,000,000 outstanding at any one time. The fund shall be established by the deposit by the New York company with the Treasury on or before June 30, 1948, of the sum of $10,000,000 from the invested depreciation reserve funds presently maintained by the New York company, which amount, less any amounts borrowed therefrom by the corporation from time to time, shall be maintained by the Treasury as a separate fund. Amounts borrowed from said fund shall be paid over to the coroporation by the Secretary of the Treasury, and repayments thereof shall be redeposited in said fund and

will be available for subsequent loans. Loans to the corporation from this fund shall not bear interest.

"255. AMENDMENT OR REPEAL.—The right to alter, amend, or repeal this article is expressly reserved.

"256. SEPARABILITY CLAUSE.—If any provision of this article, or the application of such provision to any person or circumstances, is held invalid, the remainder of this article and the application of such provision to other persons and circumstances shall not be affected thereby."

2. Section 2 of the Act of August 12, 1949, amending the Canal Zone Code, Title 2, Sections 51 and 52, 63 Stat. 601, provides in pertinent part:

SEC. 51. AUTHORIZATION FOR ESTABLISHMENT AND OPERATION OF VARIOUS FACILITIES.—(a) In connection with the operation, maintenance, sanitation, and civil government of the Panama Canal and Canal Zone, the President is authorized to establish, maintain, and operate, through the Panama Railroad Company, or otherwise, docks, wharves, piers, drydocks, shops, yards, marine railways, salvage and towing facilities, dredging facilities, construction facilities, fuel-handling facilities, motor-transportation facilities, civil air terminals, power systems, water and sewer systems, warehouses, storehouses, hotels, a printing plant, living quarters and other buildings, and any other necessary facilities and appurtenances, for the purpose of providing, at reasonable prices, fuel, electric power, water, equipment, supplies and materials generally, repairs, labor transportation, quarters, space in buildings, wharf and like services, hotel and restaurant services, and services generally, including recreational services, and for the purpose of assembling, assorting, storing, repairing, and selling scrap and

other byproducts of manufacturing and shop operations, and materials, supplies, and equipment purchased or acquired for the construction, improvement, operation, maintenance, sanitation, or civil government of the Panama Canal or Canal Zone and which are obsolete, unserviceable, or no longer needed. The sales, services, equipment, supplies, and materials hereinbefore referred to may be made or furnished to vessels, to agencies of the Government of the United States, to the Panama Railroad Company, to employees of the Government of the United States or of the Panama Railroad Company, and to any other governments, agencies, persons, corporations, companies, or associations eligible to make or receive such purchases, services, supplies, or materials under the laws prevailing at the time and the policies heretofore or hereafter adopted consistently with such laws.

(b) In the event the President has heretofore elected, or shall at any time hereafter elect, to maintain and operate through the Panama Railroad Company any of the facilities and appurtenances referred to in this section or section 52 of this title, theretofore maintained and operated by the Panama Canal, the President is authorized to transfer to the Panama Railroad Company all or as much as may be determined to be necessary of the personnel, property, records, related assets, contracts, obligations, and liabilities of or appertaining to the said facility and its appurtenances, and such transfer shall be deemed to have been accepted and assumed by the Panama Railroad Company without the necessity of any act or acts on the part of the said corporation except as otherwise stipulated in provisions of law applicable to the said corporation.

SEC. 52. ORGANIZATION AND CONDUCT OF ANY SUCH FACILITIES BY PANAMA CANAL AS "BUSINESS OPERATIONS".—The President may cause

any or all of the facilities and appurtenances referred to in paragraph (a) or (b) of section 51 of this title to be organized and conducted by the Panama Canal as "business operations", and in such case the aggregate net profit if any accruing from the conduct of such business operations shall annually be covered into the Treasury of the United States.

3. The Act of September 26, 1950, 64 Stat. 1038, To Authorize and Provide for the Maintenance and Operation of the Panama Canal by the Present Corporate Adjunct of the Panama Canal, as Renamed, to Reconstitute the Agency Charged With the Civil Government of the Canal Zone, and for other purposes, provides:

Section 5 of title 2 of the Canal Zone Code, approved June 19, 1934 (48 Stat. 1122), is amended to read as follows:

"5. ESTABLISHMENT, ADMINISTRATION, AND FUNCTIONS OF CANAL ZONE GOVERNMENT.—The independent agency of the United States heretofore known as the Panama Canal shall hereafter—

"(1) be known as the Canal Zone Government;

"(2) be administered, under the supervision of the President or such officer of the United States as may be designated by him, by a Governor of the Canal Zone; and

"(3) be charged, except as otherwise provided by law, with the performance of the various duties connected with the civil government, including health, sanitation and protection, of the Canal Zone.

"CROSS-REFERENCE

"Appointment of other necessary persons, see section 84 of this title, as amended."

SEC. 2. (a) Except as otherwise provided in, or where inconsistent with, the provisions of this Act—

(1) the terms "the Panama Canal", "the Canal", and "the Canal authorities", wherever appearing in the statutes of the United States and having reference, prospectively, to the agency heretofore known by those names, are amended to read "the Canal Zone Government"; and

(2) the term "the Panama Railroad Company", wherever appearing in the statutes of the United States and having reference, prospectively, to the corporation heretofore known by that name, is amended to read "the Panama Canal Company".

(b) Except as otherwise provided in this Act, the title "the Governor of the Panama Canal", wherever appearing in the statutes of the United States, is amended to read "the Governor of the Canal Zone".

(c) Sections 982, 987, and 1024 of title 4, and section 833 of title 5, of the Canal Zone Code, are amended by deleting the term "the Panama Canal", appearing in each of said sections, and inserting in lieu thereof the term "the Panama Canal Company".

(d) Section 836 of title 5 of the Canal Zone Code is amended by deleting the term "the Government of the Canal Zone", which appears in paragraph b of said section and inserting in lieu thereof the term "the Panama Canal Company".

(e) The headline and introductory clause of section 7 of title 2 of the Canal Zone Code are amended to read as follows:

"7. CONTROL AND JURISDICTION OF GOVERNOR OVER CANAL ZONE.—The Governor of the Canal Zone shall: * * *."

SEC. 3. Section 10 of title 2 of the Canal Zone Code, as amended by section 1 of the Act of June 13, 1940 (ch. 358, 54 Stat. 387), is further amended to read as follows:

"10. INJURIES TO VESSELS, CARGO, CREW, OR PASSENGERS, OCCASIONED BY OPERATION OF CANAL—(a) INJURIES IN LOCKS OF CANAL.—The Panama Canal Company shall promptly adjust and pay damages for injuries to vessels, or to the cargo, crew, or passengers of vessels, which may arise by reason of the passage of such vessels through the locks of the Panama Canal under the control of officers or employees of the said corporation: *Provided, however,* That no such damages shall be paid in any case where the injury was proximately caused by the negligence or fault of the vessel, master, crew, or passengers: *Provided further,* That in any case wherein the negligence or fault of the vessel, master, crew, or passengers proximately contributed to the injury, the award of damages shall be diminished in proportion to the negligence or fault attributable to the said vessel, master, crew, or passengers: *And provided further,* That damages shall not be allowed and paid for injuries to any protrusion beyond the side of a vessel, whether such protrusion is permanent or temporary in character. A vessel shall be considered to be passing through the locks of the Canal, under the control of officers or employees of the corporation, from the time the first towing line is made fast on board before entrance into the locks and until the towing lines are cast off upon, or immediately prior to, departure from the lock chamber.

"(b) INJURIES OTHER THAN IN LOCKS.—The Panama Canal Company shall promptly adjust and pay damages for injuries to vessels, or to the cargo, crew, or passengers of vessels which may arise by reason of the presence of such vessels in the waters of the Canal Zone, other than the locks, when the injury was proximately caused by negligence or fault on the part of any officer or employee of the corporation acting within the scope of his employment and in the line of his duties in connection with

the operation of the canal: *Provided, however,* That in any case wherein the negligence or fault of the vessel, master, crew, or passengers proximately contributed to the injury, the award of damages shall be diminished in proportion to the negligence or fault attributable to the said vessel, master, crew, or passengers: *And provided further,* That in the case of any vessel which is required by or pursuant to regulations prescribed under section 9 of this title, as amended, to have a Panama Canal pilot on duty aboard, no damages shall be adjusted and paid for injuries to any vessel, or to the cargo, crew, or passengers of any such vessel, incurred while the vessel was under way and in motion, unless at the time such injuries were incurred the navigation or movement of the vessel was under the control of a Panama Canal pilot.

"(*c*) MEASURE OF DAMAGES GENERALLY.—In determining the amount of the award of damages for injuries to a vessel for which the Panama Canal Company is found or determined to be liable, there may be included (1) actual or estimated cost of repairs; (2) charter hire actually lost by the owners, or charter hire actually paid, depending upon the terms of the charter party, for the time the vessel is undergoing repairs; (3) maintenance of the vessel and wages of the crew, if such are found to be actual additional expenses or losses incurred outside of the charter hire; (4) other expenses which are definitely and accurately shown to have been incurred necessarily and by reason of the accident or injuries: *Provided, however,* That there shall not be allowed agent's fees or commissions or other incidental expenses of similar character, or any items which are indefinite, indeterminable, speculative, or conjectural. The corporation shall be furnished such

vouchers, receipts, or other evidence as may be necessary in support of any item of a claim. If a vessel is not operated under charter but by the owner directly, evidence shall be secured if available as to the sum for which vessels of the same size and class can be chartered in the market. If such charter value cannot be determined, the value of the use of such vessel to its owners in the business in which it was engaged at the time of the injuries shall be used as a basis for estimating the damages for the vessel's detention; and the books of the owners showing the vessel's earnings about the time of the accident or injuries shall be considered as evidence of probable earnings during the time of detention. If the books are unavailable, such other evidence shall be furnished as may be necessary.

"(d) DELAYS FOR WHICH NO RESPONSIBILITY ASSUMED.—The Panama Canal Company shall not be responsible, nor consider any claim, for demurrage or delays occasioned by landslides or other natural causes, by necessary construction or maintenance work on Canal locks, terminals, or equipment, by obstructions arising from accidents, by time necessary for admeasurement, by congestion of traffic, or by any other cause except as specially set forth in this section.

"(e) SETTLEMENT OF CLAIMS.—The amounts of the respective awards of damages under this section may be adjusted, fixed, and determined by the corporation by mutual agreement, compromise, or otherwise; and acceptance by any claimant of the amount awarded to him shall be deemed to be in full settlement of such claims.

"(f) ACTIONS ON CLAIMS.—Any claimant for damages under this section who considers himself aggrieved by the findings, determination,

or award of the Panama Canal Company in reference to his claim may bring an action on such claim against the said corporation in the United States District Court for the District of the Canal Zone; and in any such action the provisions of this section relative to the determination, adjustment, and payment of such claims, and the provisions of the regulations established under section 9 of this title, as amended, relative to navigation of Canal Zone waters and to transiting of the Panama Canal, shall be applicable. No action for damages which is cognizable under this section shall lie against the said corporation otherwise, or in

any other court, than as provided in this paragraph, or shall lie against any officer or employee of the corporation: *Provided, however*, That nothing in this paragraph shall be construed to prevent or prohibit actions against officers or employees of the said corporation for damages for injuries resulting from acts of such officers or employees outside the scope of their employment or not in the line of their duties or from acts of such officers or employees committed or performed with intent to injure the person or property of another. Actions under this paragraph shall be tried by the court without a jury.

"(g) INVESTIGATION BEFORE VESSEL'S DEPARTURE.—Notwithstanding any other provision of law, no claim shall be considered under this section, nor shall any action for damages lie thereon, unless, prior to the departure from Canal Zone waters of the vessel involved, the investigation by the competent authorities of the accident or injury giving rise to such claim shall have been completed, and the basis for the claim shall have been laid before the corporation."

SEC. 4. Section 82 of title 2 of the Canal Zone Code is amended to read as follows:

"82. COMPENSATION OF PERSONS IN MILITARY, NAVAL, OR PUBLIC HEALTH SERVICE.—(a) If any of the persons appointed or employed as provided in section 6, or section 81, as amended, of this title are in the military, naval, or Public Health Service of the United States, the amount of the official salary paid to any such person shall be deducted from the amount of salary or compensation provided by or which shall be fixed under the terms of those sections, but this section shall not be construed as requiring the deduction from the amount of such salary or compensation of—

"(1) the retired pay or allowance of any retired warrant officer or enlisted man of the

Army, Navy, Air Force, Marine Corps, or Coast Guard; or

"(2) the training pay, retainer pay or allowances of any warrant officer or enlisted man of the Reserve forces of the Army, Navy, Air Force, Marine Corps, or Coast Guard.

"(b) The Canal Zone Government shall annually pay to each of the aforesaid services an amount sufficient to reimburse the said service for the official salary paid to any person in such service for the period of appointment or employment by the Canal Zone Government."

SEC. 5. The headline and first sentence of section 245 of title 2 of the Canal Zone Code, as added by the Act of June 29, 1948 (ch. 706, 62 Stat. 1075), are amended to read as follows:

"245. CREATION, PURPOSES, OFFICES, AND RESIDENCE OF PANAMA CANAL COMPANY.—For the purposes of maintaining and operating the Panama Canal and of conducting business operations incident to such maintenance and operation and incident to the civil government of the Canal Zone, there is hereby created, as an agency and instrumentality of the United States, a body corporate to be known as the Panama Canal Company, hereinafter referred to as the 'corporation'. * * *."

SEC. 6. Paragraph (c) of section 246 of title 2, Canal Zone Code, as added by the Act of June 29, 1948, is amended to read as follows:

"(c) In order to reimburse the Treasury, as nearly as possible, for the interest cost of the funds or other assets directly invested in the corporation, the corporation shall pay interest to the Treasury on the net direct investment of the Government in the corporation as defined in paragraphs (a) and (b) of this section, and shown by the receipt described therein, at a rate or rates determined by the Secretary of the Treasury as required to reimburse the Treasury for its cost. Payments of such interest charges shall be made annually to the

extent earned, and if not earned shall be made from subsequent earnings."

SEC. 7. Section 246 of title 2, Canal Zone Code, as added by the Act of June 29, 1948, is amended by adding at the end thereof a new paragraph lettered (e) and reading as follows:

"(e) The corporation is further obligated to pay into the Treasury as miscellaneous receipts amounts sufficient to reimburse the Treasury, as nearly as possible, (1) for the annuity payments under article XIV of the convention of November 18, 1903, between the United States of America and the Republic of Panama, as modified by article VII of the treaty of March 2, 1936, between the said Governments, and (2) for the net costs of operation of the agency known as the Canal Zone Government. The net costs of operation of the Canal Zone Government, which are deemed to form an integral part of the costs of operation of the Panama Canal enterprise as a whole, shall not include interest but shall include depreciation and the reimbursement of other Government agencies for expenditures made on behalf of the Canal Zone Government. The payments into the Treasury, referred to in this paragraph, shall be made annually to the extent earned, and if not earned shall be made from subsequent earnings unless the Congress shall otherwise direct."

SEC. 8. Subparagraph (e) of section 248 of title 2, Canal Zone Code, as added by the Act of June 29, 1948, is amended by adding at the end thereof a sentence reading as follows: "The provisions of section 82 of this title, as amended, shall apply to the corporation and to its officers and employees."

SEC. 9. Section 249 of title 2 of the Canal Zone Code, as added by the Act of June 29, 1948, is amended by relettering subparagraphs (a) to (f) thereof as subparagraphs (b) to (g), respectively, and by inserting after the intro-

ductory clause of said section a new subparagraph reading as follows:

"(a) May maintain and operate the Panama Canal."

SEC. 10. Article 3 of chapter 12 of title 2, Canal Zone Code, as added by the Act of June 29, 1948, is amended by renumbering sections 255 and 256 of said title 2 as sections 257 and 258, respectively, and by adding, in said article 3, two new sections numbered 255 and 256 and reading as follows:

"255. APPROPRIATIONS TO COVER LOSSES.—Appropriations are hereby authorized for payment to the corporation of such amounts as may be shown in the annual budget program of the corporation as necessary to cover losses sustained in the conduct of its activities. Amounts appropriated to the corporation under authority of this section shall not be added to the amount of the receipt referred to in paragraphs (a) and (b) of section 246 of this title, and shall not require payment of interest under paragraph (c) of said section 246: *Provided, however,* That repayments by the corporation to the Treasury shall in no case be treated as dividends under sections 246 (d) and 253 of this title until all amounts appropriated to the corporation under authority of this section shall have been repaid to the Treasury."

"256. AUTHORIZATION FOR TRANSFER OF PANAMA CANAL TO CORPORATION.—The President is hereby authorized to transfer to the corporation the Panama Canal, together with the facilities and appurtenances related thereto, and any or all of the facilities and appurtenances heretofore maintained and operated by the Panama Canal under authority of section 51 of title 2 of the Canal Zone Code, as amended by section 2 of the Act of August 12, 1949 (ch. 422, 63 Stat. 601), and all or so much as he may determine to be necessary of the

personnel, property, records, related assets, contracts, obligations, and liabilities of or appertaining to the said Canal and the aforesaid facilities or appurtenances, and such transfer shall be deemed to have been accepted and assumed by the corporation without the necessity of any act or acts on the part of the corporation except as otherwise stipulated in the provisions of section 246 of this title."

SEC. 11. Section 411 of title 2 of the Canal Zone Code is amended to read as follows:

"411. AUTHORITY TO PRESCRIBE MEASUREMENT RULES AND TOLLS.—The Panama Canal Company is authorized to prescribe and from time to time change (1) the rules for the measurement of vessels for the Panama Canal, and (2), subject to the provisions of the section next following, the tolls that shall be levied for the use of the Panama Canal: *Provided, however,* That the rules of measurement, and the rates of tolls, prevailing on the effective date of this amended section shall continue in effect until changed as provided in this section: *Provided further,* That the said corporation shall give six months' notice, by publication in the Federal Register, of any and all proposed changes in basic rules of measurement and of any and all proposed changes in rates of tolls, during which period a public hearing shall be conducted: *And provided further,* That changes in basic rules of measurement and changes in rates of tolls shall be subject to, and shall take effect upon, the approval of the President of the United States, whose action in such matter shall be final and conclusive."

SEC. 12. Section 412 of title 2 of the Canal Zone Code, as amended by the Act of August 24, 1937 (ch. 752, 50 Stat. 750), is amended to read as follows:

"412. BASES OF TOLLS.—(a) Tolls on merchant vessels, army and navy transports, colliers, tankers, hospital ships, supply ships, and

yachts shall be based on net vessel-tons of one hundred cubic feet each of actual earning capacity determined in accordance with the rules for the measurement of vessels for the Panama Canal, and tolls on other floating craft shall be based on displacement tonnage. The rate of tolls on vessels in ballast without passengers or cargo may be less than the rate of tolls for vessels with passengers or cargo.

"(b) Tolls shall be prescribed at a rate or rates calculated to cover, as nearly as practicable, all costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto, including interest and depreciation, and an appropriate share of the net costs of operation of the agency known as the Canal Zone Government. In the determination of such appropriate share, substantial weight shall be given to the ratio of the estimated gross revenues from tolls to the estimated total gross revenues of the said corporation exclusive of the cost of commodities resold, and exclusive of revenues arising from transactions within the said corporation or from transactions with the Canal Zone Government.

"(c) Vessels operated by the United States, including warships, naval tenders, colliers, tankers, transports, hospital ships, and other vessels owned or chartered by the United States for transporting troops or supplies, may in the discretion of the President of the United States be required to pay tolls. In the event, however, that such vessels are not required to pay tolls, the tolls thereon shall nevertheless be computed and the amounts thereof shall be treated as revenues of the Panama Canal Company for the purpose of prescribing the rates of tolls, and shall be offset against the obligations of the said corporation under paragraphs (c) and (e) of section 246 of this title, as amended.

"(d) The levy of tolls is subject to the provisions of section 1 of article III of the treaty between the United States of America and Great Britain concluded on November 18, 1901, of articles XVIII and XIX of the convention between the United States of America and the Republic of Panama concluded on November 18, 1903, and of article I of the treaty between the United States of America and the Republic of Colombia proclaimed on March 30, 1922.

"(e) Capital investment for interest purposes shall not include any interest during construction."

SEC. 13. The following statutes and parts of statutes are repealed:

(1) Canal Zone Code, title 2, sections 32 and 33;

(2) Canal Zone Code, title 2, sections 51 to 54, as amended by section 2 of the Act of August 12, 1949 (ch. 422, 63 Stat. 601);

(3) Canal Zone Code, title 2, section 414;

(4) The paragraph entitled "Housing of officers serving in the Canal Zone" of the Act of July 9, 1918 (ch. 143, 40 Stat. 855; 10 U. S. C., sec. 721);

(5) Subparagraph (g) of section 2680 of title 28, United States Code;

(6) Section 6 of the Act of August 1, 1914 (ch. 223, 38 Stat. 679; 31 U. S. C., sec. 621);

(7) Section 1 of the Act of June 29, 1948 (ch. 706, 62 Stat. 1075; 48 U. S. C., sec. 1361); and

(8) All statutes and parts of statutes inconsistent with this Act, to the extent of such inconsistency.

SEC. 14. Except for section 256 of title 2 of the Canal Zone Code, as added by section 10 of this Act, this Act shall take effect upon the effective date of the transfer to the corporation, pursuant to the provisions of said section 256, of the Panama Canal together with the facilities and appurtenances related thereto.

II

4. The Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001, *et seq.*, provides in pertinent part:

SEC. 2 [5 U. S. C. 1001]. As used in this Act—

* * * * *

(c) *Rule and Rule Making.*—"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

* * * * *

SEC. 4 [5 U. S. C. 1003]. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

* * * * *

(d) *Petitions.*—Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

* * * * *

SEC. 10 [5 U. S. C. 1009]. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) *Right of Review.*—Any person suffering legal wrong because of any agency action, or

adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) *Form and Venue of Action.*—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) *Reviewable Acts.*—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) *Interim Relief.*—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from

or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) *Scope of Review.*—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

III

100 CONG. REC. (DAILY ED.) A1995–1996*

STUDY OF PANAMA CANAL TOLLS

EXTENSION OF REMARKS OF HON. GLENN R. DAVIS, OF WISCONSIN, IN THE HOUSE OF REPRESENTATIVES, TUESDAY MARCH 16, 1954

Mr. DAVIS of Wisconsin. Mr. Speaker, under unanimous consent to extend my remarks in the RECORD, I would like to include the results of a recent study on tolls for the Panama Canal. This study was conducted under the supervision of the Panama Canal Company and submitted to the Congress by the Governor of the Canal Zone:

MARCH 5, 1954.

Hon. JOSEPH W. MARTIN, Jr.,
Speaker of the House.

MY DEAR MR. SPEAKER: The conference report on the civil functions appropriation bill, 1954 (H. Rept. No. 889, 83d Cong.) contained the following directive to the Panama Canal Company:

"The conferees also desire to point out the urgency of the completion of the current tolls study regarding the adequacy of tolls presently charged vessels using the canal. The conferees will expect this study to be completed and submitted to the Congress so as to be fully considered in the 2d session of the 83d Congress."

The establishment of tolls for the use of the Panama Canal is governed principally by sections 411 to 413 of title 2, Canal Zone Code, as amended by the act of September 26, 1950 (61 Stat. 1041).

*Not printed in the permanent edition of the Congressional Record.

Section 411 of title 2 vests in the Company authority to prescribe and from time to time change the tolls for the use of the canal, subject to the provisions of section 412 of title 2 (which prescribes bases of tolls), and subject to provisos that the Company shall give 6 months' notice, by publication in the Federal Register, of proposed changes in rates of tolls, during which a public hearing shall be conducted, and that changes in rates of tolls shall be subject to, and shall take effect upon, the approval of the President of the United States, whose action in such matter is made final and conclusive.

Under the statutes in question, the Company is obligated to maintain a continuous observation and evaluation of tolls rates, in relation to estimates of cost, traffic and revenues, from the standpoint of determining whether, in terms of long-range trends, the rates existing at a given time are proper and should be maintained or whether some adjustment is required. Proceedings to change the tolls are thus to be instituted by the Company, whenever the Company concludes that changes in the rates are indicated and necessary, and arrives at proposed specific new rates of tolls.

An initial study of the adequacy of tolls rates under the new legislation has now been completed by the Company. This study reveals that, largely as a result of the very high level of traffic using the canal in recent years without a corresponding increase in costs, the tolls rates that have been in effect since 1938 are still sufficient to cover all operating costs, including interest and depreciation, as required by the tolls statutes. This conclusion is based on the assumption that the Director of the Bureau of the Budget, who under the law must approve the valuation of the assets transferred to the Company from the agency formerly known as the Panama Canal, will concur generally in the valuations tentatively established by the Company

upon which the interest and depreciation requirements for the most part have been based.

In recent months, chiefly as the result of the cessation of hostilities in Korea, there has been some drop in traffic transiting the canal. The Company's study indicates that a further and more substantial decline in the volume of canal traffic during the next few years is to be expected primarily as the result of changing economic factors affecting world movements of petroleum and its products, iron ore, and coal. It is possible that by sometime during the fiscal year 1955 canal traffic will have declined to a point where revenues at existing rates will no longer be adequate to cover all charges. Should this condition materialize and should it appear reasonably certain that it will continue for an appreciable length of time, the Company will promptly take the steps available to it to increase the rates of tolls.

In computing the tolls requirements for purposes of this study the Company has made what it believes to be an adequate allowance for depreciation giving due consideration to the factors of obsolescence and potential inadequacy of the capital assets includable in the tolls base. Estimates of the service lives used for the principal classes of plant and equipment have been approved by independent engineering consultants. A depreciation rate of 1 percent per annum from date of service has been used for the investment in the channel, harbors, lock structures, dams, breakwaters and similar long-lived facilities. Including this accrual the annual depreciation requirements of the Company are presently approximately $9 million.

The tentative valuations used in the study result in a net interest-bearing investment of the Government in the Canal enterprise, as defined by law, of $274 million. At the rate of 2.342 percent currently established for repayment of interest costs as required by the Company's charter annual interest payments to the Treasury will amount to $6.4 million. It is expected that

this amount will increase somewhat in the future years as the result of the generally rising trend of long term interest rates.

No depreciation or return on the capital value of interest during the 1904–14 construction period has been included in the study because the legislative history of the present tolls statutes clearly indicates the intent of the Congress to exclude this item entirely from the tolls base. Likewise no provision has been made for amortization of lands and treaty rights because of lack of statutory authority, although these assets have been included in the investment for interest purposes.

Using the tentative plant valuations developed by the Company and recomputing the operating costs and expenses accordingly, the aggregate net income of the Company from all sources for the 4-year period from the reorganization to June 30, 1955, under present tolls rates is estimated to be approximately $9 million after providing for all charges currently authorized and required by law. As previously indicated however, it appears that a possible decline in volume of Canal traffic coupled with rising interest and wage rates may necessitate an increase in the tolls rates in the near future. Current indications are that such an increase may be necessary by July 1, 1955, in which case public announcement of the new rates would be made 6 months earlier or January 1, 1955, as required by law.

There is attached as background material a short historical summary of Panama Canal tolls rates and a copy of the present tolls statutes.

Sincerely yours,

J. S. SEYBOLD,
President.

SHORT HISTORY OF PANAMA CANAL TOLLS RATES

The Panama Canal was opened to commerce on August 15, 1914.

Proclamation No. 1225, issued by the President of the United States on November 13, 1912, prescribing the following rates of toll to be paid by vessels using the Panama Canal:

"(a) On merchant vessels carrying passengers or cargo $1.20 per net vessel ton—each 100 cubic feet—of actual earning capacity.

"(b) On vessels in ballast without passengers or cargo, 40 percent less than the rate of tolls for vessels with passengers or cargo.

"(c) Upon naval vessels, other than transports, colliers, hospital ships, and supply ships, 50 cents per displacement ton.

"(d) Upon Army and Navy transports, colliers, hospital ships, and supply ships $1.20 per net ton, the vessels to be measured by the same rules as are employed in determining the net tonnage of merchant vessels."

The toll rates prescribed by Proclamation No. 1225, were established pursuant to section 5 of the Panama Canal Act of August 24, 1912, which authorized tolls to be based upon gross or net registered tonnage, displacement tonnage, or otherwise, but provided that if the tolls were not based upon net registered tonnage they should not exceed the equivalent of $1.25 per net registered ton nor be less than the equivalent of $0.75 per net registered ton. This section was subsequently carried into the Canal Zone Code as section 412 of title 2.

In order to determine the amount of tolls payable under this legislation it was necessary to consider the net tonnage of the vessel under the United States rules as well as under the Panama Canal rules of measurement, creating what came to be known as the dual system of measurement. This permitted vessels by taking full advantage of the rules governing the com-

putation of registered tonnage to reduce the basis for their tolls assessment with the result that the Government was deprived of revenue which it would have otherwise received under the Panama Canal rules.

To meet this situation the President, acting under authority of the Congress, appointed a Special Committee on Panama Canal Tolls and Vessel Measurement Rules to make an independent study of the whole problem and recommend modifications of the rules of measurement and rates to be charged in order to provide a practical, just, and equitable system of measuring vessels and levying tolls.

The special committee, after an exhaustive study, submitted its report to the President, who transmitted it to Congress February 26, 1937, with a message approving the recommendations of the committee for the enactment of necessary remedial legislation, which would abolish the unsatisfactory dual system of measurement and establish a single system based on Panama Canal rules of measurement to which the limits fixed by Congress would be applied.

The recommendations of the special committee were adopted by the Congress in the act of August 24, 1937 (50 Stat. 750), providing that tolls should be based on the tonnage determined in accordance with rules of measurement prescribed by the President within maximum and minimum limitations, $1 and $0.75 per net vessel ton, respectively.

Pursuant to authority contained in the law, the President issued proclamation No. 2247 of August 25, 1937, establishing the following rates of toll for vessels using the Panama Canal:

"(a) On merchant vessels, yachts, Army and Navy transports, colliers, hospital ships, and supply ships, when carrying passengers or cargo, 90 cents per net vessel ton of 100 cubic feet each of actual earning capacity.

"(b) On vessels in ballast without passengers or cargo, 72 cents per net-vessel-ton.

"(c) On other floating craft, including warships, other than transports, colliers, hospital ships, and supply ships, 50 cents per ton of displacement."

New rules for measurement of vessels using the canal were prescribed by proclamation No. 2248, also issued on August 25, 1937, and effective March 1, 1938.

In 1948, on the recommendation of the Governor of the Panama Canal, the President issued proclamation No. 2775 of March 26, 1948, increasing tolls to the maximum statutory limit of $1 per ton, effective October 1, 1948. At congressional request the effective date of this proclamation was successively postponed by proclamations Nos. 2808, 2831, 2852, and 2875, to April 1, 1949, September 1, 1949; April 1, 1950; and April 1, 1951, respectively. In response to a request contained in House Report No. 1304, 81st Congress, the President on January 31, 1950, transmitted to the Congress a report and recommendations of the Bureau of the Budget with respect to the organization and operations of the Panama Canal and Panama Railroad Company (H. Doc. 460, 81st Cong.). That report recommended, among other things, adoption of a new basis for levying tolls.

The act of September 26, 1950 (61 Stat. 1041), reorganized the canal enterprise along the lines recommended by the Bureau of the Budget, and amended section 412 of title 2 of the Canal Zone Code prescribing the bases of tolls. The section, as amended, is set out in full in attachment B. Concurrently, with his approval of the act of September 26, 1950, the President issued proclamation 2903 of September 26, 1950, revoking proclamation No. 2775 of March 26, 1948. The new tolls legislation became effective July 1, 1951.

IV

APPROVAL, DATED SEPTEMBER 9, 1957, BY THE DIRECTOR OF THE BUDGET OF THE VALUATION OF THE PROPERTIES TRANSFERRED TO THE PANAMA CANAL COMPANY BY THE CANAL ZONE GOVERNMENT.

EXECUTIVE OFFICE OF THE PRESIDENT
BUREAU OF THE BUDGET
WASHINGTON 25, D. C.

SEPTEMBER 9, 1957.

MY DEAR GENERAL POTTER:

I have your letter of July 17, 1957, transmitting an agreement of the same date between the Panama Canal Company and the Canal Zone Government as to the valuation of certain properties transferred to the Company, effective July 1, 1950, under the provisions of Executive Order 10102, and effective July 1, 1951, under Executive Order 10263. The agreement also covers the valuation of certain miscellaneous items transferred to the Company which had no usable value to the Company at the time of the 1951 transfer but which were reactivated to use in the fiscal years 1956 and 1957. The properties transferred are described in the documents referred to in the agreement.

Section 246 (b) of Title 2 of the Canal Zone Code, as added by the Act of June 29, 1948 (62 Stat. 1076) requires that my approval be given to the amounts agreed upon between the two agencies, in accordance with the provisions of that section, as the amounts at which the properties should be transferred. Your letter requests approval of the amounts set forth in the agreement, as follows: $5,002,091.59 for assets transferred effective July 1, 1950; $396,861,673.99 for assets transferred effective July 1, 1951; and $11,348.14 applicable to fiscal year 1956 and $69,588.14 applicable to fiscal

year 1957 for the items reactivated to use in those years.

I hereby approve, pursuant to the provisions of section 246 (b) of the Canal Zone Code, the amounts set forth in the agreement of July 17, 1957, between the Canal Zone Government and the Panama Canal Company, as the amounts at which the properties referred to therein shall be transferred from the Canal Zone Government to the Panama Canal Company.

Sincerely yours,

(Signed) PERCIVAL F. BRUNDAGE,
Director.

Major General William E. Potter
President, Panama Canal Company
Balboa Heights, Canal Zone
Attention: Mr. Merrill Whitman
Secretary, Panama Canal Company
425 - 13th Street, N. W.
Washington, D. C.

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Nos. 251 and 252

In the Supreme Court of the United States

OCTOBER TERM, 1957

PANAMA CANAL COMPANY, PETITIONER

v.

GRACE LINE, INC., ET AL.

GRACE LINE, INC., ET AL., CROSS-PETITIONERS

v.

PANAMA CANAL COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PANAMA CANAL COMPANY

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
SAMUEL D. SLADE,
HERMAN MARCUSE,
Attorneys,
Department of Justice, Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 251

PANAMA CANAL COMPANY, PETITIONER

v.

GRACE LINE, INC., ET AL.

No. 252

GRACE LINE, INC, ET AL, CROSS-PETITIONERS

v.

PANAMA CANAL COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PANAMA CANAL COMPANY

Respondents' answering brief containing 196 pages and an Appendix of 50 pages was served on petitioner on March 23, 1958, *i. e.*, ten days before this case was to be reached for argument in regular order. Because of this time factor, we have not been able to analyze and refute every statement and assertion contained in respondents' brief. Checks of that brief,

however, have shown that significant representations of fact and law have been made with a high degree of inaccuracy. We shall limit this reply brief to pointing out as many of those inaccuracies as time has permitted, as well as emphasizing the fundamental errors in respondents' presentation.

I

RESPONDENTS' CONTENTIONS OF TREATY VIOLATION AND OF IMPROPER BOOKKEEPING

The basic problem raised by this case is whether or not the District Court for the Southern District of New York has jurisdiction and authority to compel petitioner to prescribe new tolls, although the Canal Company, in the exercise of the judgment and discretion conferred upon it, has determined that the current rates are proper. Respondents, and to some extent the *amici curiae*, minimize this fundamental problem. Instead, respondents assert repeatedly that petitioner has violated treaty obligations of the United States; and that it has been guilty of bad faith, of engaging in improper business and bookkeeping practices, of paying illegal dividends, and of submitting incomplete reports. These reiterated accusations are without any foundation whatever.

A. PETITIONER HAS NOT VIOLATED THE INTERNATIONAL DUTY OF THE UNITED STATES TO CHARGE JUST AND EQUITABLE RATES FOR THE USE OF THE CANAL

Respondents' brief is replete with the charge that petitioner has flouted the obligation of the United States under the Hay-Pauncefote Treaty to charge "just and equitable" or "reasonable" rates. Significantly, neither the complaint nor respondents' motion

for summary judgment (R. 4–9, 13–40) contains any allegation to that effect. Those documents charge that petitioner has failed to comply with the statutory toll formula and do not make any reference to the Hay-Pauncefoté Treaty or an inherent duty to charge *reasonable*, rather than *statutory*, rates.[1] Nevertheless, respondents now argue that the toll formula of Section 412 was designed to codify the requirement of the Hay-Pauncefote Treaty to charge just and equitable rates, and that our interpretation of the function of the President's approval power would result in the repudiation of international obligations of the United States. Obviously this is not so.

1. The tolls charged by petitioner are just and equitable within the meaning of the Hay-Pauncefote Treaty

According to the position taken by the British Government, the pertinent international obligations of the United States under Article III of the Hay-Pauncefote Treaty (Main Brief, pp. 6–7) are two-fold:—(1) The acceptance of the principle of neutralization implies the duty not to discriminate, and (2) the undertaking that the charges shall be just and equitable means that tolls should be limited to "the amount representing the fair value of the services rendered, *i. e.*, to the interest on the capital expended and the

[1] In our Main Brief, we have shown (at pp. 121–123, 129) that the toll formula, as interpreted by respondents, does not yield a reasonable rate because it makes no allowance for a reasonable return on the investment and the recovery of legitimate expenses.

cost of operation and maintenance of the Canal",[2] or that the tolls should be "established in relation to the capital cost of the canal and the cost of its operation and maintenance".[3]

As we shall demonstrate, Section 412 does not provide for the maximum "just and equitable" charges within this view of the Treaty, but rather for tolls amounting to about two-thirds of the amount allowable under this British view of the Treaty. Indeed, if respondents had their way, they would pay tolls covering only one-half of the charges thus permissible under the Treaty.[4]

The purpose of the 1950 statute was not to provide

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[2] Note from Sir Edward Grey, British Secretary of State for Foreign Affairs, dated November 14, 1912, *Foreign Relations of the United States* (1912), 481, 486.

[3] *Panama Canal Tolls*, Hearings before the Subcommittee of the Committee on Interoceanic Canals, United States Senate, 75th Cong., 1st Sess. on S. 1912, p. 6.

[4] See Appendix A, *infra*, pp. 44–71, setting forth a 1915 opinion of the Attorney General, holding that the Hay-Pauncefote Treaty was not violated by the giving of free transit to American Government vessels; the opinion points out, among other things, that "just and equitable rates" could be far higher than the rates then charged since "it costs the United States Government two or three times as much to transfer a vessel through the Canal as it received for such services" (p. 66). Appendix A also sets forth a 1931 opinion of the Attorney General confirming the 1915 opinion, *infra*, pp. 67–71.

We print these Attorney Generals' opinions in the Appendix because petitioner's brief in this Court stresses, to a very great extent, its alleged rights under the Hay-Pauncefote Treaty. The 1915 opinion is referred to at R. 93 (in the Bureau of the Budget's report to the President on the Organization of the Panama Canal and Panama Railroad Company, which was transmitted by the President to the Speaker of the House of Representatives).

for compensatory tolls, which would have been at the prohibitive rate of $1.40 per net vessel ton, but to provide for tolls ranging from about 95¢ to $1.05 (Main Brief, pp. 14–17, 87–88), *i. e.*, about one-third below the rates permissible under the British construction of the Hay-Pauncefote Treaty.[5] This goal was accomplished by lowering or eliminating some cost elements and by providing for additional revenue. Interest on the Government's investment was decreased from 3 per centum to 2.3 per centum (Main Brief, pp. 14–15). Interest on an item of $115,000,000 representing interest accrued during the construction period, or approximately $2,500,000 a year[6] was waived. This waiver was designed to take account of the defense value of the Canal (R. 111, 166). The free transit of Government vessels was eliminated.[7] This provided additional income of more than $1,000,000 in peacetime.[8] Finally, it was provided that the Canal operations should not bear the entire cost of the Canal Zone Government but that part thereof should be borne by the business activities of the Panama Railroad Company which previously had been exempted from this burden.[9]

These concessions by the United States were gra-

[5] See Appendix A, *infra*, pp. 44–71.

[6] Main Brief, p. 15; R. 163.

[7] Main Brief, p. 15; see Appendix A, *infra*, pp. 44–71.

[8] H. Doc. 351, 84th Cong., 2d Sess., p. 53; H. Doc. 99, 85th Cong., 1st Sess., p. 47. During the Korean hostilities, the tolls collected on Government vessels were much higher. Between July 1, 1951 and June 30, 1954 this item amounted to nearly $13,000,000. R. 60. H. Doc. 234, 83rd Cong., 1st Sess., p. 41.

[9] Main Brief, p. 15.

tuities, and did not constitute a codification of the Treaty obligations. The British Government has been alert in protecting its Treaty rights as shown by its protests against the exemption of vessels engaged in the coastwise trading of the United States which led to the note of Sir Edward Gray (supra, p. 4, fn. 2), and again by the *amicus curiae* brief filed here. Still, as far as we have been able to discover, it did not protest to the United States Government, between 1914 and 1950, that the United States had violated its Treaty obligations by charging the Canal interests at more than the "going" rate, by charging interest on the interest accrued during the construction period, by failing to exact tolls for the transit of United States Government vessels, and by failing to charge the Panama Railway Company a share in the cost of the Canal Zone Government. This acquiescence, extending over a period of thirty-six years, amounts to a practical construction of the Hay-Pauncefote Treaty and to a recognition that by including these items among the costs to be recovered by tolls the United States did not charge more than "the fair value of the services rendered" (*supra*, pp. 3–4).[10]

The statutory toll formula thus does not restate the obligation of the United States under international law to charge "just and equitable" rates, but provides for a lower figure. Moreover, from respondents' viewpoint, the issue involved in this case must be purely a matter of technical statutory interpretation—not of fairness or equity—*viz.*, whether the terms of Section 412 permit the United States to in-

[10] See Appendix A, *infra*, pp. 48, 63–66.

clude the operating deficit of the supporting business activities in the "costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto". The Comptroller General—on whose reading of Section 412 respondents rest—himself concedes that, as a matter of fairness and proper accountancy, this item constitutes a legitimate operating expense of the Canal (which, however, must be ignored according to his reading of the toll formula as it now stands).[11] In short, the charge by petitioner of a true operating expense to the cost of maintaining and operating the Canal plainly does not violate the international duty of the the United States to charge no more than "just and reasonable rates".

2. The Hay-Pauncefote Treaty does not preclude the President from considering policy matters in connection with his approval of the tolls proposed by petitioner

In our Main Brief, we pointed out (at pp. 65–70) that the requirement of Presidential approval of the tolls proposed by petitioner does not constitute an idle gesture, that the President's functions are not limited to those of a supervising cost accountant, but that he may consider policy issues, particularly in the fields of national transportation policy and of foreign rela-

[11] H. Doc. 160, 84th Cong., 1st Sess., pp. 8–9, 14–16 (R. 47, 56–59); H. Doc. 210, 85th Cong., 1st Sess., pp. 2, 7, 16. It will be noted that the Comptroller General strongly urged an amendment of the toll formula in order to permit the inclusion of such a deficit in the computation of the tolls.

Throughout their brief, respondents ignore this significant view of the Comptroller General, while simultaneously stressing his technical and restricted interpretation of Section 412.

tions. Respondents assert that it would constitute a violation of the Hay-Pauncefote Treaty if the President considered any matter other than whether the proposed tolls are within the statutory formula, considered purely from the accounting viewpoint.[12] This, we submit, constitutes a misapprehension of the duties of the United States under the Treaty.

Those obligations, as we have shown *supra,* pp. 3–4, are not to discriminate and to charge just and equitable rates. The President thus may take into consideration national transportation policy, as long as he recognizes the principle of equality of use and, certainly, so long as the rates remain as far below the permissible Treaty level as they are now. Moreover, a promise not to use the Canal as an instrument of national policy does not mean that we are committed to a policy of international irresponsibility. If a change of the toll rates is likely to create an international disturbance or to have an adverse effect on world trade (cf. R. 95), the United States certainly is under a duty not to limit itself to purely accounting problems in the determination of the toll rates. To the contrary, the Treaty does not prohibit this country from responding to its overriding moral obligation to attempt, if possible, to avoid actions with respect to the Canal that might create unsettling political or economic disorder on an international level. The concept of "just and equitable" embraces factors other than purely fiscal or cost-accounting elements.

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[12] The *Amicus Curiae* Brief of the Government of the United Kingdom refers to "national transportation policy and foreign policy" as factors not contemplated by the Treaty (p. 7).

3. The application of the Hay-Pauncefote Treaty is not before Court

Although, as we have just pointed out, the petitioner's view of Section 412 does not, in any way, violate the Hay-Pauncefote Treaty, it is again appropriate to emphasize that the application of the Treaty is not now before the Court. Respondents are American companies and cannot rest on the Treaty as conferring litigable rights upon them (Main Brief, pp. 129–131). The Government of the United Kingdom has not suggested to the Department of State that it believes the Treaty to have been violated, and, if it should do so, the proper forum for resolving the issue, at least initially, would be the forum of diplomacy. The present case was begun by respondents, and carried on, as a domestic litigation turning on Sections 411 and 412 of the Canal Zone Code. At the very best the precise meaning of the Treaty has only a tangential relationship to this domestic litigation—although the very existence of the Treaty does emphasize the significant character of the President's role in the determination of the Canal tolls and does suggest that the problem is not a judicial one.

B. PETITIONER IS NOT GUILTY OF ANY DECEPTIVE PRACTICES OR FLAGRANT VIOLATIONS OF THE STATUTE

Throughout their brief, respondents charge that petitioner has been guilty of concealing its financial situation by ambiguous bookkeeping, and of a defiant disregard of its statutory duties. There is no merit at all to these repeated accusations.

1. Petitioner has not concealed its financial condition

(*a*). In repeatedly asserting that petitioner has "concealed" what it was doing by "ambiguous bookkeeping" (Respondents' Brief, pp. 60*ff*),[13] respondents try to create the impression that there is something sinister and suspicious about the fact that in 1953 petitioner abandoned the practice of the former Panama Railroad Company of allocating administrative and general overhead expense to its various activities, and that, instead, it charged those expenses to the profits of the corporation as a whole.

The fact is that petitioner has given full publicity to this change in accounting practice in its Third Annual Report (R. 176), and has explained it to Con-

[13] This statement is taken from a similar statement in the opinion below which represents one of the several misapprehensions of fact under which that court labored. See, *e. g.*, the statement that the district judge had awarded summary judgment (R. 236), while, actually, he had refused to pass on that motion and had stayed it (R. 202, 205, 207, 212–213); the assertion that petitioner was reincorporated in 1948 under a federal charter in order to assure better financial supervision (R. 237), while actually this reincorporation was required by Section 304 (b) of the Government Corporation Control Act; the claim that the power of approval was reserved to the President in order to protect the American shipping industry (R. 248)—this theory has been repudiated by respondents (Respondents' Brief, p. 121); the failure to recognize that the supporting business activities are not "other ventures" (R. 248-249), but are "essential to the operation of the Canal and the maintenance of [its] employees * * *" (R. 75; Main Brief, p. 10); and the assumption that the appraisal of petitioner's assets had been completed (R. 249), cf. our Main Brief, pp. 180–181.

gress in detail.[14] The explanation for the shift is quite simple and obvious. Accounting practices which could be used for the Panama Railroad Company, which was engaged in a limited number of business activities of a comparable nature, were not adaptable to the Panama Canal Company, having assets twenty times as large,[15] a far larger staff,[16] and engaged in many more activities of a more varied nature. Moreover, advanced accounting practices have shown that the allocation of overhead expenses to the various activities does not constitute a true cost-accounting distribution. Any person able to read a financial statement can understand petitioner's accounting methods. Indeed, by omitting to allocate the general corporate expenses to the several activities and by keeping them in a single account, it has become much easier to discover whether or not administrative and overhead expenses have risen.

(*b*). Respondents also charge that petitioner's report for 1957 contains even less information than the earlier ones and that it is totally inadequate to advise

[14] *Study of the Operations of the Panama Canal Company and the Canal Zone Government.* Hearings before the Committee on Merchant Marine and Fisheries, House of Representatives, 84th Cong., 1st Sess., pp. 17–18.

[15] Comptroller General's Report for 1952, H. Doc. 207, 83rd Cong., 1st Sess., p. 78.

[16] On June 30, 1951, *i. e.*, the day before the transfer, the Panama Railroad Company employed 579 employees paid at United States rates, and 5,517 employees paid at local rates. On July 1, 1951, the Panama Canal Company had 3,024 United States rate employees, 12,977 paid at local rates. Cf. H. Doc. 336, 82nd Cong., 2d Sess., p. 5, with H. Doc. 234, 83rd Cong., 1st Sess., p. 29.

respondents as to petitioner's affairs (Respondents' Brief, pp. 18, fn. 4, 56). Respondents obviously refer to the interim report issued by petitioner which varies in format and dimensions from the final agency report which will be submitted to Congress. This brief report states expressly:

> It is impossible to include comprehensive coverage of the Company's varied operations and major activities of the Board of Directors in a brief report of this type. We have, therefore, presented here only the highlights of the year's operations and the principal financial reports and operating statistics will follow. More detailed information will be presented in the regular agency report which will be published at a later date.[17]

In view of this specific statement and of the circumstance that an interim report of this type has been issued previously, it is hard to understand how respondents could mistake the 28-page pamphlet for the regular annual report.

(*c*). Of similar inaccuracy is respondent's assertion that, up to 1951, petitioner's supporting business activities had not only fully earned their administrative expenses but also paid substantial dividends, and that they now fail even to meet their administrative expenses—leading to the inference that "some radical change has affected the business activities, that this change has been concealed by its bookkeeping and that the resultant losses have been loaded on tolls" (Respondents' Brief, pp. 21, 65–66).

[17] See also Appendix B, *infra*, pp. 72–73.

The fact is that the net income of the Panama Railroad Company (after administrative expenses) for the fiscal years 1950 and 1951 amounted to $557,778 and $159,371, respectively.[18] Comparable figures for petitioner's fiscal year 1954 appear at R. 179.[19] They show an operating income before general corporate expenses as follows:

Canal and other marine operations	$24,263,841
Allied maritime operations	1,518,020
Supporting service operations[19a]	2,549,197
Total	28,331,058

The General Corporate Expenses consist of:

Net cost of Canal Zone Government	$10,306,079
Interest payable to U. S. Treasury	8,847,255
Administrative and other general expenses	4,957,714
Total	24,171,048

The "supporting service operations" thus were able to pay a very large portion of the *Administrative and General Expense* and still earn a profit comparable to that of the Panama Railroad Company. Petitioner's *General Corporate Expense*, of course, is not comparable with the *Administrative Expense* of the Panama Railroad Company; the latter did not include any portion of the cost of the Canal Zone Government and of the interest payable to the United States, totaling $19,000,000 in 1954.[20]

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[18] H. Doc. 336, 82nd Cong., 2d Sess., p. 4.

[19] The figures for fiscal 1956 are similar; see H. Doc. 99, 85th Cong., 1st Sess., p. 47.

[19a] These operations correspond roughly to the activities formerly operated by the Panama Railroad Company.

[20] The alleged increase of petitioner's administrative expenses thus is either nonexistent or is fully explained by the circumstance that the Panama Canal Company has very substantial corporate expense for which the Panama Railroad Company had no counterpart.

The paper losses of the supporting activities computed by the Comptroller General thus do not result from ambiguous bookkeeping or a deliberate and sinister inflation of petitioner's administrative expenses, but from the stubborn economic fact that these activities are unable to earn enough to foot the bill for any substantial portion of the cost of the Canal Zone Government and the interest payable to the United States.[21] There is neither magic nor chicanery in this outcome. The Panama Railroad Company, with an average annual profit of $1,000,000, would not have been able, either, to shoulder a substantial portion of those expenses (see our Main Brief, p. 15, fn. 35).

What respondents have been doing throughout their brief has been to give a sinister meaning to the obvious, *viz.*, that neither the Panama Railroad Company, nor petitioner's supporting business activities, had the financial capacity to earn much more than $1,000,000 a year, let alone a substantial part of the cost of the Canal Zone Government and of the interest payable to the United States. Hence, the deficit in the supporting activities computed by the Comptroller General was caused by inexorable economic laws, not by ambiguous bookkeeping and concealment.[22] Respond-

[21] We have shown in our Main Brief (pp. 83–84) that it is not feasible substantially to increase the profits of the supporting activities. Any attempt to do so would either price vitally needed facilities out of business, or increase petitioner's direct operation expenses.

[22] Respondents also charge that the payment of surplus funds to the United States Treasury, as required by Section 253, constituted a payment "of large sums to the U. S. Treasury without lawful warrant" (Respondents' Brief, p. 24), and that this payment was in violation of the toll formula (*ibid.*, p. 56,

ents have not tried to explain the plain fact that neither the Bureau of the Budget nor Congress, both well aware of this controversy,[23] have tried to correct petitioner's supposed misdeeds.

2. In any event, the losses of petitioner's business activities constitute legitimate elements of the cost of operating and maintaining the Panama Canal

We have shown in our Main Brief (pp. 84–86) that any losses of petitioner's business activities are recoverable as costs of maintaining and operating the Panama Canal together with the facilities and appurtenances thereto. This view is supported by the legislative findings that the business activities of the Canal are "essential to the operation of the Canal, and the maintenance of employees required in the conduct of the Canal enterprise" (R. 75), and by this Court's recognition that these activities constitute an integral part of the Canal venture. *New York ex rel. Rogers* v. *Graves*, 299 U. S. 401. Obviously, an enterprise such as the Panama Canal, located in the tropics and hundreds of miles from major port installations,

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footnote). Respondents would have the toll formula, as interpreted by them, repeal Section 253 by implication. Repeals by implication, however, are never favored (*United States* v. *Borden Co.*, 308 U. S. 188, 198–199). And this is particularly true where a statute sets forth, as carefully as the 1950 Act, the extent to which it overrides the prior legislation *in pari materia*. Payment of the dividends was made on the insistence of the Bureau of the Budget and of the General Accounting Office (R. 46, 50). The General Accounting Office has reported the dividends paid by petitioner three times without making any objections (R. 46, 50). H. Doc. 465, 84th Cong., 2d Sess., p. 49 and H. Doc. 210, 85th Cong., 1st Sess., p. 44.

[23] Main Brief, pp. 20, 53, 136–138.

requires repair, bunkering, and other terminal installations, as well as commissary, housing, and hotel facilities for its permanent employees and transient official visitors resident in the temperate zone.[24]

(*a*). Respondents seek to overcome these legislative and judicial findings by the semantic device of calling these *essential* activities "collateral" (Respondents' Brief, p. 46), and by overstressing that to some extent these activities serve the armed forces, the general public, and the Republic of Panama; on this basis, respondents assert that the deficit of the supporting activities was substantially due to national defense policy (Respondents' Brief, pp. 46–51, 50).[25] But respondents cannot properly treat the supporting activities as exclusively concerned with non-Canal purposes; obviously, these activities are directly related to the functioning and maintenance of the Canal itself, even though they may partially serve the other purposes as well. And, as we have shown (*supra*, p. 5), the United States waived interest on interest accrued during the construction period, an item amounting to $2,500,000 per annum, in order to compensate petitioner (and, indirectly, the Canal users) for the incidence of defense costs upon the Canal. The

[24] This Court recognized fully that proper attention to the Canal's employees required the operation of seeming marginal activities such as a dairy and hotels (299 U. S. at 408).

[25] The sole support for this assertion is the statement of the Comptroller General that petitioner is employing United States citizens in many positions that could be filled locally (Respondents' Brief, pp. 50–51; R. 56–58). There is nothing to indicate that this personnel policy rests primarily, if at all, upon considerations of national defense.

Canal users plainly are not entitled to a second credit. Respondents have not even attempted to show that the benefits to the general public and the Republic of Panama from the supporting activities contribute to any appreciable extent to their losses.

(*b*). Respondents' second argument is that the term "facilities and appurtenances related thereto" in the toll formula does not refer to *all* the facilities and appurtenances pertaining to the Canal, but only to those which were transferred to petitioner together with the Canal pursuant to Title 2, Section 256 of the Canal Zone Code (Respondents' Brief, pp. 31–33). No reason is given for this limited interpretation of the general words "facilities and appurtenances". Respondents do not, and cannot, explain why the expenses of the facilities and appurtenances transferred in 1951 should have been singled out as a cost item recoverable by tolls, as distinguished from the facilities and appurtenances already belonging to the Panama Railroad Company. As we have pointed out in our Main Brief and *supra*, p. 7, even the Comptroller General believes that the cost of the supporting activities here in question *should* clearly be reflected in the tolls.

Moreover, respondents' interpretation makes the toll formula so cumbersome and complicated that it cannot represent the true Congressional purpose. Chronologically, petitioner's facilities and appurtenances fall into three groups:—those originally operated by the Panama Railroad Company; those transferred to the Panama Railroad Company as of July 1, 1950 by Executive Order 10102 (3 CFR (1950 Supp.) 80) pursuant to the Act of August 12, 1949 (Main

Brief, pp. 157–159); and those transferred as of July 1, 1951, pursuant to the 1950 statute.

The original assets of the Panama Canal Company (when it was called the Panama Railroad Company) consisted roughly of the Railroad, three steamships, harbor terminals, a commissary system, a telephone system, and the Hotel Washington, valued on June 30, 1950 at some $45,000,000 (H. Doc. 336, 82nd Cong., 2d Sess., p. 25).[26] Executive Order 10102 (*supra*, p. 17) transferred to the Panama Railroad Company facilities and appurtenances then valued at about $10,000,000, consisting (among others) of harbor terminals, coal and oil handling plants, certain commissary and railroad facilities, and printing plants (H. Doc. 336, 82nd Cong., 2d Sess., p. 25). The facilities and appurtenances transferred to petitioner in 1951 pursuant to Section 256—the only ones whose losses (according to respondents' theory) are chargeable to the tolls—consisted of the following items:[27]

Locks and appurtenances	$85, 867, 170
Floating equipment	16, 232, 557
Buildings, other structures and equipment	70, 327, 923
Total	172, 427, 650

—about three times as much as the undepreciated value[28] of the Panama Railroad Company. The item "Buildings, other structures, and equipment" includes (among others) employees' housing, electric power system, water system, certain commissary plants and stores, marine repairshops, general storehouses, club-

[26] This figure, as well as the figures on the following pages, do not take account of depreciation.

[27] H. Doc. 207, 83rd Cong., 1st Sess., pp. 81–82.

[28] *Supra*, fn. 26.

houses, a telephone system, motor transportation, and hotels.

Thus, if respondents' interpretation of the toll formula were right, the losses of a large portion of the facilities and appurtenances still would be chargeable to costs. This, however, would cast upon petitioner the burden of determining what appurtenance and facilities historically had belonged to the Panama Railroad Company and which had been transferred to it in 1951. Petitioner would be required not only to split up certain activities, such as the telephone, commissary and hotel operations, but would also be compelled to determine the time when each element of these facilities had been transferred to petitioner (not to mention the problems resulting from replacement).

Such an intent is not easily imputed to Congress, and there appears to be no rational reason why the losses of the marine repair shop, general store, houses, clubhouses and of one hotel should be recoverable through tolls—and those of the marine terminals, marine bunkering facilities, and of another hotel, should not. The answer, we submit, is obvious. Congress never intended to place any such limitation upon the recovery of legitimate business expenses through Canal tolls.

Moreover, as we have emphasized in our Main Brief, the result of respondents' extremely narrow interpretation of the toll formula would be that the United States would have to pay for the deficit of the supporting activities, thus providing for a toll reduction to respondents at the cost of the Government. This, of course, is in complete conflict with

the expressed congressional purpose, *viz,* that the tolls should be raised to 95¢ or $1.00 and that the toll formula should not result in any loss of revenue (Main Brief, pp. 86–88). Respondents suggest that it would not be necessary to appropriate funds to pay for this deficit, because the interest rate could be lowered instead (Respondents' Brief, pp. 138–139). They have not explained why such bookkeeping manipulations would not constitute a loss to the Government which would somehow have to be made up.

(*c*). In any event, it is crystal clear, from what we have said in our Main Brief and in the preceding discussion, that respondents' view of the meaning of the toll formula is neither plainly right nor compelling. We believe on the contrary that petitioner has correctly read Section 412; but the very best that can be said for respondents is that the statute is ambiguous and that they may possibly be right. In such circumstances, they can hardly demand that the courts intervene to compel action by the use of mandatory powers; those powers are to be employed only where the official duty is clear and indisputable. Main Brief, pp. 71 *ff.*

II

RESPONDENTS' CONTENTIONS AS TO JURISDICTION.

In the first part of this reply brief, we have answered certain contentions made by respondents that petitioner has violated international and municipal law and has kept its books and accounts in an improper manner. Here, we shall deal with the jurisdictional issues, the basic issues in the case.

A. INQUIRY INTO JURISDICTION OVER THE SUBJECT MATTER IS NOT PRECLUDED BY THE FILING OF A COMPLAINT FRAMED SO AS TO CONFORM WITH 28 U. S. C. 1331, OR THE WAIVER OF SOVEREIGN IMMUNITY

Respondents make the astonishing assertions that we are precluded from challenging the jurisdiction of the courts over the subject matter because their complaint has been framed in accordance with Form 2 (b) of the Appendix to the Federal Rules of Civil Procedure, and because the courts have jurisdiction over the person of the petitioner (Respondents' Brief, pp. 86–91).

1. The form of the complaint cannot confer jurisdiction over the subject matter

Respondents argue that their complaint has been framed carefully so as to invoke the jurisdiction of the federal courts by pleading a colorable claim under the Constitution, laws, or treaties of the United States, employing the phraseology suggested by Form 2 (b) of the Appendix to the Federal Rules of Civil Procedure; they then claim, invoking the authority of *Bell* v. *Hood,* 327 U. S. 678, that such a complaint cannot be dismissed for a lack of jurisdiction over the subject matter. Obviously, respondents' contention proves too much. If it were true, the motion to dismiss for lack of jurisdiction would be abolished for all practical purposes in the federal courts.

Bell v. *Hood, supra,* holds that where federal jurisdiction is based upon the allegation of a claim arising under the Constitution, laws or treaties of the United States, which is not insubstantial or frivolous on its

face, the jurisdiction of the federal courts cannot be challenged on the ground that the allegations do not state a federal cause of action (327 U. S. at 682–685).[29] The existence *vel non* of a claim for which relief can be granted goes to the merits of the case, and a decision on that issue would be *res judicata* on the parties. *Montana-Dakota Co.* v. *Public Service Co.*, 341 U. S. 246, 249. The rule that the question whether the complaint sets forth a *federal* claim cannot be challenged on motion to dismiss for lack of jurisdiction, however, does not mean that the pleading of a federal claim forecloses an inquiry into *other* jurisdictional defects. Our motion to dismiss was not based on the ground that the complaint simply fails to allege a cause of action, federal or otherwise, but that the courts lack jurisdiction of the subject matter.

2. That the courts may have jurisdiction over petitioner's person has no bearing on the question of whether they have jurisdiction over the subject matter of this litigation

Throughout their brief, respondents stress that petitioner is subject to suit like any private corporation. We have pointed out that a waiver of sovereign immunity goes to the jurisdiction over petitioner's person, and has no bearing on the issue of the courts' jurisdiction over the subject matter (Main Brief, p. 56). Respondents seek to overcome this difficulty by arguing that "we know that the 81st Congress specifically intended by the adoption of the Act of

[29] See the explanation of the opinion in *Bell* v. *Hood*, *supra*, by its author, in *Johnson* v. *Eisentrager*, 339 U. S. 763, 792 (dissenting opinion of Black, *J.*), in which it was made clear that the rule of *Bell* v. *Hood* presupposes the existence of "jurisdiction of subject matter and parties".

July 16, 1949 [excepting petitioner from the coverage of the Federal Tort Claims Act] that it [petitioner] 'should be subject to suits on *all* claims, tort as well as contract, in the *same* manner as any *private* corporation' " (Respondents' Brief, p. 185). The word "should" does not appear in the pertinent legislative history. The pertinent passages in the Committee reports [30] merely explain that, prior to the enactment of the Federal Tort Claims Act, the Panama Railroad Company, then incorporated under the laws of New York, had been subject to suit in the same manner as a private corporation. The Committee reports took the position that many of the detailed provisions of the Federal Tort Claims Act were not adaptable to a corporation engaged in business as a common carrier and operating out of earnings rather than out of appropriated funds. They, therefore, recommended the enactment of 28 U. S. C. 2680 (m), excepting the Panama Railroad Company from the operation of the Tort Claims Act.

The legislative history of this 1949 statute, dealing with the tort liability of the supporting activities (then operated by the Panama Railroad Company), has little relation to the problems connected with the operation and management of the Canal itself, and the determination of the toll charges. Indeed, those parts of the Act of 1950 which deal with petitioner's liability for torts arising from the operation of the

[30] H. Rept. 830, 81st Cong., 1st Sess., pp. 1–2; S. Rept. 167, 81st Cong., 1st Sess., pp. 1–2.

Canal,[31] show that petitioner is not liable like a private corporation for all the torts committed by it. Similarly, the unique provisions of Section 411, providing for a hearing *after* the proposal of new toll charges and for presidential approval, are indicative of a congressional purpose that, so far as rate determinations are concerned, petitioner is not to be assimilated to a private utility. And this Court has recognized that Government corporations cannot be fully and automatically equated with private corporations. *Federal Crop Insurance Corp.* v. *Merrill,* 332 U. S. 380, 383–384. Attention must always be paid to the particular problem and the particular circumstances.

In addition, respondents' insistence that petitioner must be treated in all respects as a private corporation ignores the specific requirements of the Administrative Procedure Act—on which respondents purport to rely (Respondents' Brief, p. 5). Respondents recognize that petitioner is an agency and instrumentality of the United States, and they claim that the failure to propose new tolls constitutes federal agency action (Respondents' Brief, pp. 93, 149, 155). But, according to Section 10 of the Administrative Procedure Act, judicial review of a Government agency's action is not available where precluded by statute, or where the action is of a discretionary nature; judicial review furthermore presupposes standing to sue, and the existence of a court of competent jurisdiction. These statutory requirements, part of which are con-

[31] Canal Zone Code, Title 2, Section 10, as amended, Main Brief, pp. 160–163.

stitutional in nature, can be modified, if at all, only by express enactment (Administrative Procedure Act, Section 12, 5 U. S. C. 1011); they are not relinquished by implication, merely as a result of a waiver of sovereign immunity as to the particular federal agency. It follows that, whatever may be true of private corporations, petitioner's actions cannot be reviewed except in conformity with the requirements of the Administrative Procedure Act.

B. THE NATURE OF THE PRESIDENT'S POWER TO APPROVE TOLLS PROPOSED BY PETITIONER

In our Main Brief, we have shown that petitioner's function in connection with the rate determination constitutes essentially the giving of internal advice to the President, not subject to judicial review or discipline, and that the salient, final, administrative act is the approval of the tolls by the President who has to consider matters quite different from those taken into account by petitioner (Main Brief, pp. 61–70). Respondents seek to belittle the President's role in the statutory plan, and also argue that if our interpretation of the statute were correct it would constitute a violation of the Constitution and the Hay-Pauncefote Treaty[32] (Respondent's Brief, pp. 102–131).

1. The importance of presidential review

Respondents minimize the importance of the Presidential approval requirement of Section 411 because the review clause was barely mentioned in the legislative history of the Act (Respondents' Brief, pp. 104–106). The need for Presidential review of the toll

[32] We have disposed of the last argument, *supra*, pp. 7–8.

rates in the light of national transportation policy, world trade and shipping—indeed, the essential nature of Presidential approval—was stressed at least four times in the legislative history:—twice in the basic document upon which the 1950 Act was based, the recommendations of the Bureau of the Budget with respect to the Organization and Operations of the Panama Canal and the Panama Railroad Company (R. 81 at 95, 102), and again in the hearings before the Senate (R. 109) and before the House of Representatives.[33] This emphasis on the essential nature of Presidential review and approval was made by representatives of the Bureau of the Budget, who had prepared the basis for the statutory plan and who explained the bill to the Committee. It is entitled to great weight.

The fact that this point was not stressed during the remainder of the legislative consideration is not astonishing. This feature of the 1950 Act—that the President had the ultimate authority over the tolls—did not constitute any change in the existing law. Hence, it required less explanation and debate than the new aspects of the Act, such as those which supplied the President with a body of trained advisors who would assist him in the determination of the tolls, and those which lessened the financial burden of the Panama Canal.

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[33] Main Brief, p. 67, fn. 86.

2. The functions of the President under the statute do not involve an unconstitutional delegation of power

Respondents claim that Section 411 would be unconstitutional for failure to supply an "intelligible principle", if the President, in approving the tolls proposed by petitioner, could take into consideration matters other than those specified in the toll formula. As far as domestic matters are concerned, the legislative history indicates that the President should be guided by the principles of National Transportation Policy set forth in detail in Section 1 of the Transportation Act of 1940 (54 Stat. 889, 49 U. S. C., Ch. 1, note). This plainly supplies an intelligible principle. In the field of foreign relations, *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 315–322, 327, teaches that the principles of *Panama Refining Co* v. *Ryan*, 293 U. S. 388 and *Schechter Corp.* v. *United States*, 295 U. S. 495, are inapplicable.[34] Moreover, the standards for the administrative setting of charges for the use of Government-owned properties and facilities are less demanding than where the delegation is in the field of regulation.

The argument that Congress could not be presumed to permit the President to disregard the law equates

[34] The unconstitutionality of that part of Section 411 which requires presidential approval would be of little help to respondents. Since the approval requirement constitutes an essential part of the statutory plan (Main Brief, pp. 66–67), its unconstitutionality would invalidate the remainder of Sections 411 and 412, *i. e.*, the very basis of respondents' claim for relief.

the specific factors mentioned in the toll formula with the law, and thus begs the question. Under Section 411, petitioner is authorized to *prescribe* the tolls. Section 412 provides the formula pursuant to which petitioner is to *prescribe* tolls. The formula thus is designed to guide petitioner's proposals; it does not limit the President's approval power. The President may base the tolls actually approved by him upon considerations other than cold figures or accounting principles. In doing this, he does not violate the "law" because the toll formula, according to its own language, is intended to set a standard for the President's rate-making advisor, not to restrict the authority of the President himself.[35]

C. THE DUTY TO PRESCRIBE TO NEW TOLLS IS NOT OF A MINISTERIAL NATURE

Throughout their brief, respondents assume that petitioner's duty to prescribe *new* tolls is of a ministerial nature, and hence enforceable by mandamus. But if there be a ministerial duty at all, it is petitioner's obligation to consider whether or not new tolls are appropriate. If petitioner peremptorily refused even to examine that question, mandamus proceedings might perhaps be instituted by a person having standing to sue in a court which has jurisdiction to grant mandatory relief. *Virginia Ry. Co.* v. *System Federation No. 40,* 300 U. S. 515, 551; *Interstate Commerce Commission* v. *Humboldt S. S. Co.,* 224 U. S. 474, 485. Petitioner, however, does not refuse to consider the problem. It currently is observing and examining

[35] Cf. Main Brief, p. 66.

whether or not a change in the toll rates is indicated or necessary, and it has decided that up to now no such action has been necessary.[36]

Respondents' argument that this negative decision constitutes mere "thinking about tolls" (Respondents' Brief, pp. 136, 138) brings to the fore a significant feature of the statutory plan. The very circumstances that petitioner needs to formalize only its positive decision to *change* the tolls and that there are no formal proceedings prior to that decision highlight the fact that petitioner's activities connected with the proposing of new tolls do not constitute conventional agency action subject to judicial review, but rather constitute an internal advisory activity within the Government, subject to disciplinary, but not judicial, review or compulsion.

In any event, the decision to change or not to change the tolls is discretionary. We have shown the many issues involved, requiring the determination of facts and the exercise of business judgment (Main Brief, pp. 81–84). Respondents' discussion of the factual background has accentuated the uncertainties and doubts in that area. Finally, we have shown that, apart from these discretionary elements, petitioner's decision hinged ultimately on the legal question of whether an operating deficit in the supporting business facilities, which even the Comptroller General has conceded to be a legitimate operating expense, constitutes an element of maintaining and operating the Panama Canal, together with the facilities and ap-

[36] Cf. Main Brief, pp. 17–18, 78–79, see also *New York Times*, January 30, 1956, p. 52, column 1.

purtenances thereto, within the meaning of the toll formula.

We believe we have shown that this question must be answered in the affirmative (Main Brief, pp. 84–89; see also *supra,* pp. 15–20), especially in view of the fact that the deficit has been caused by the allocation to the supporting activities of a portion of the cost of the Canal Zone Government, which according to Section 246 (e) constitutes an integral part of the cost of operating the Panama Canal enterprise as a whole. But in no event can it be said that petitioner's interpretation of the statute is arbitrary or capricious, or clearly erroneous. We repeat that, in these circumstances, the courts will not re amine this question of law (cf. Main Brief, pp. 73–74, 88–89).

Respondents' admit frankly at p. 137 of their brief that what they seek to compel is not agency action but what they consider to be "correct" agency action. This Court, however, has stated firmly that, while it may compel an agency to act where it arbitrarily refuses to act at all, it will not seek to control or guide the exercise of the agency's authority (Main Brief, p. 78). In particular, this Court will not, where an agency has acted, compel it to repeat its action and to reverse its earlier decision (Main Brief, p. 79). This is exactly what respondents have asked the judiciary to do in this case.

D. RESPONDENTS LACK STANDING TO SUE

We have shown in our Main Brief (pp. 100–131) that there are two reasons why respondents lack standing to challenge the alleged violation by peti-

tioner of its official duties. First, because respondents cannot show an interference with any legal right specifically belonging to them, since their interests do not differ from those of the general public in the proper administration of the law; and, second, because respondents are not adversely affected or aggrieved within the meaning of any relevant statute (*i. e.*, because the Canal Zone Code does not authorize such a suit by a person who has merely suffered a financial loss).

Respondents seek to overcome these obstacles by asserting that the United States entered into the Hay-Pauncefote Treaty and passed the 1950 Act in order to convey specific benefits and rights upon the shipping industry (Respondents' Brief, pp. 152-153), not for the benefit of "civilization" [37] or the public as a whole.[38] This attitude is in full accord with respondents' suggestion that the deficit in petitioner's operations which would be caused by toll reductions would not require Congressional appropriations but could be met by reducing the interest payments to the United States (*supra,* p. 20). But this assertion that the 1950 statute was designed to confer rights upon respondents cannot prevail over the generally recognized rule that a regulatory statute does not constitute class legislation for the benefit of the users, but is designed to benefit the body politic as a whole; for that reason, a user may challenge the administration of such statute only where he is ex-

[37] Respondents' Brief, pp. 12, 153.

[38] Cf. our Main Brief, pp. 123-125.

pressly authorized to do so as a private Attorney General.[39]

E. THE DISTRICT COURTS OUTSIDE THE DISTRICT OF COLUMBIA DO NOT HAVE JURISDICTION TO AWARD MANDATORY RELIEF

On pp. 160–169 of their brief, respondents discuss the power of the federal courts to issue order of a mandatory nature and conclude (at p. 169) that the petitioner "relies largely on ancient cases obviously overruled by *In re Lennon, Virginian Ry., Peoria Ry., Brown* and other decisions of this Court". None of those cases has any bearing on the issue at hand, *viz,* whether the federal courts outside the District of Columbia have jurisdiction to award original mandatory relief in the absence of statutory authorization. The "segregation" or "integration" cases, as is well known to the Court, did not involve applications for original mandatory relief but injunctions against discrimination on account of color or race; in the remaining decisions, the mandatory relief was based upon specific provisions contained in the Interstate Commerce and Railway Labor Acts.

1. The "segregation" or "integration" cases

The gist of these cases has not been to compel official action—admission to schools—but to enjoin the de-

[39] *Reade* v. *Ewing*, 205 F. 2d 630 (C. A. 2); *United States* v. *Public Utilities Commission*, 151 F. 2d 609 (C. A. D. C.); *Federal Communications Commission* v. *Sanders Radio Station*, 309 U. S. 470, 476–477; *American Power & Light Co.* v. *S. E. C.*, 325 U. S. 385; *Associated Industries* v. *Ickes*, 134 F. 2d 694 (C. A. 2), cited in Respondents' Brief at pp. 148, 149, 155, all involve cases where persons financially affected had standing to sue because the statute expressly so provided; most of those cases state that, absent such specific authorization, the mere finan-

fendant officials from continuing unconstitutional interference with the plaintiff's constitutional rights. This is evident from the prayers in the complaint in *Brown* v. *Board of Education*, 347 U. S. 483, 349 U. S. 294, which request—apart from declaratory relief:

> 4. The Honorable Court issue a permanent injunction forever restraining and enjoining the defendants from *executing* so much of Ch. 72–1724, General Statutes of Kansas, 1935, as empowers them to set up separate schools for Negro and white school children.
>
> 5. The Honorable Court issue a permanent injunction forever restraining defendants from *denying* the Negro school children of Topeka, Shawnee County, Kansas, *on account of their race or color,* the right and privilege of attending public schools within the district wherein they live. * * *[40]

Sweatt v. *Painter*, 339 U. S. 629, arose in the state courts; *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637, did not involve a question of admission, but the question of the discriminatory treatment afforded to a colored student once he had been admitted to the school. In *Lucy* v. *Adams*, 350 U. S. 1, the decree did not direct admission but enjoined the defendants from

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cial loss would not have been sufficient to confer standing on the plaintiffs. See our Main Brief at pp. 106–107, 124–125.

[40] Transcript of Record in No. 1, October Term, 1954, p. 7. Emphasis added. For similar complaints, see October Term, 1954, No. 2, pp. 10–11; No. 3, pp. 25–30; No. 5, pp. A20–A21. Significantly, the complaint in No. 4 (*Bolling* v. *Sharpe*), arising in the District of Columbia, contains a prayer for active mandatory relief requiring admission to a specific school in addition to a request to enjoin discrimination on the grounds of color and race (Transcript of Record, pp. 11–13).

denying the plaintiffs admission "solely on account of their race and color".

These "segregation" cases decided by this Court thus do not stand for the proposition that the federal courts outside the District of Columbia [41] have power to compel effective official action. Brevity does not permit us to analyze all the decisions of the lower federal courts cited by respondents on p. 166 of their brief. In *Bryce* v. *Byrd*, 201 F. 2d 664 (C. A. 5), the defendant was not ordered to register, as respondents assert, but to cease discriminatory practices. Similarly, in *School Board of the City of Charlottesville* v. *Allen*, 240 F. 2d 59, 64 (C. A. 4), the defendants were not "ordered to admit" but to refrain from discriminating on account of race, leaving all other grounds of denial unaffected.[42] These cases thus do not indicate a departure from the rule of *McIntire* v. *Wood*, 7 Cranch 503 (Main Brief, pp. 90 *ff*).

2. Respondents' remaining cases are all based upon specific statutory authority for mandatory relief

(*a*). *The Interstate Commerce Act.* Respondents place great stress on the mandatory relief awarded in *In re Lennon*, 166 U. S. 548, and a statement in *Peoria Ry. Co.* v. *United States*, 263 U. S. 528, indicating, by way of explanation, that switching orders are enforce-

[41] Cf. *Bolling* v. *Sharpe*, *supra*, fn. 40, and *Sweatt* v. *Painter*, 339 U. S. 629.

[42] In *Clemons* v. *Board of Education*, 228 F. 2d 853 (C. A. 6), a three-way-split Court of Appeals seems to have awarded relief of a mandatory nature, by way of compromise. The Court of Appeals for the Sixth Circuit, however, is fully aware of the limitation of the powers of the federal courts to grant mandatory relief. *Youngblood* v. *United States*, 141 F. 2d 912, 913.

able by mandatory injunction, including preliminary restraining orders. The fact, however, is that in those instances the power to grant mandatory relief rested upon the specific provision of Section 10 of the Act of March 2, 1889, amending the original Interstate Commerce Act (25 Stat. 862, 49 U. S. C. 23).[43] That Section expressly authorizes all the federal district courts to award mandatory relief against discriminatory practices or the denial of equal facilities. This Court has pointed out that this amendment was necessary in order to make "the remedial processes of the [original Interstate Commerce] act more speedy and efficacious".[44]

The complaint in *In re Lennon*, 166 U. S. 548, alleged a denial of equal facilities in violation of the Interstate Commerce Act, as amended.[45] The power

[43] Section 10 of the 1889 Amendment frequently has been referred to as Section 23 of the Interstate Commerce Act. This designation has been made official by the Act of May 16, 1942, Section 5, 56 Stat. 301.

[44] *Baltimore & Ohio Railroad Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481, 499. And see *Knapp* v. *Lake Shore Ry. Co.*, 197 U. S. 536, 542–543, ruling that the duties imposed by the Interstate Commerce Act are enforceable in mandatory proceedings only where the statute so provides (our Main Brief, p. 94). For holdings that mandatory relief against discriminatory practices would not be available but for the 1889 amendment, see also *Macon, D. & S. R. Co.* v. *General Reduction Co.*, 44 F. 2d 499, 501 (C. A. 5), certiorari denied, 283 U. S. 821; *United States ex rel. Greenbrier Coal & Coke Co.* v. *Norfolk & Western Co.*, 143 Fed. 266, 267 (C. A. 4), 138 Fed. 849, 851–852 (C. C. S. D. W. Va.); *Merchants' Coal Co.* v. *Fairmont Coal Co.*, 160 Fed. 769, 779–780 (C. A. 4), appeal dismissed, 215 U. S. 614.

[45] Transcript of Record, No. 254, October Term, 1894, p. 5; see also *Toledo, Ann Arbor and N. M. Ry. Co.* v. *Pennsylvania Co.*, 54 Fed. 746, 747 (C. C. N. D. Ohio), affirmed, *sub nom. Ex parte Lennon*, 64 Fed. 320 (C. A. 6), 166 U. S. 548.

to award mandatory relief thus flows directly from Section 10 of the 1889 amendment. The same is true for the statement in *Peoria Ry. Co.* v. *United States*, 263 U. S. 528, explaining that switching duties are enforceable by mandatory relief.[46] Of the six authorities cited by this Court for this proposition (263 U. S. at 535, fn. 8), four involve discriminatory practices, *viz.*, *Toledo, Ann Arbor and N. M. Ry. Co.* v. *Pennsylvania Co.*, 54 Fed. 730 (C. C. N. D. Ohio);[47] *Toledo, Ann Arbor and N. M. Ry. Co.* v. *Pennsylvania Co.*, 54 Fed. 746 (C. C. N. D. Ohio);[48] *Chicago, Burlington & Quincy Ry. Co.* v. *Burlington, Cedar Rapids & Northern Ry. Co.*, 34 Fed. 481 (C. C. S. D. Iowa);[49] *Covington Stock-yards Co.* v. *Keith*, 139 U. S. 128, alleged unjust and illegal discrimination (139 U. S. at 129). The grant of mandatory relief in *Union Pacific R. R. Co.* v. *Hall*, 91 U. S. 343, rests, as appears from the very first sentence of that opinion, upon specific legislation, the Act of March 3, 1873 (R. S. 5262, 45 U. S. C. 88);[50] the last case, *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Iowa*, 233 U. S. 334, arose in the state

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[46] This statement in the *Peoria Ry.* case is by no means a holding. It merely served as an explanation for the reason why Congress had failed to grant certain summary powers to the Interstate Commerce Commission.

[47] This case is based on the same complaint as *Toledo, Ann Arbor and N. M. Ry Co.* v. *Pennsylvania Co.*, 54 Fed. 746 (C. C. N. D. Ohio), *i. e.*, *In re Lennon*, 166 U. S. 548, *supra*, fn. 45.

[48] This case is the district court decision in *In re Lennon*. For the allegation of discriminatory practices, see *supra*, fn. 45.

[49] The allegation of a denial of equal facilities appears at 34 Fed. at 483–484.

[50] See our Main Brief, p. 93, fn. 10.

courts of Iowa; hence, it did not present the question of whether the *federal* courts have mandamus powers.

In *Lucking* v. *Detroit Navigation Co.*, 265 U. S. 346, and *Moor* v. *Texas & N. O. R. Co.*, 297 U. S. 101 (cited in Respondents' Brief at pp. 163–165), the courts denied relief. The latter case clearly came under Section 10 of the 1889 amendment to the Interstate Commerce Act; the former involved a question of coverage under that Act. The courts held that the abandonment of a steamship line did not come within the Interstate Commerce Act and thus did not reach the issue whether mandatory relief was available under the provisions of that Act.

(*b*). *The Railway Labor Act. Virginian Ry.* v. *System Federation No. 40,* 300 U. S. 515, is based on the provisions of the Railway Labor Act of 1934, as we have shown in our Main Brief (pp. 96–97). The same applies to *Delaware & Hudson R. Corp.* v. *Williams,* 129 F. 2d 11 (C. A. 7), certiorari granted and judgments vacated, 317 U. S. 600,[51] and *Steele* v. *Louisville and Nashville R. R. Co.,* 323 U. S. 192, upon which respondents rely in other parts of their brief.

(*c*). *The Prohibition Act.* The Prohibition cases cited by respondents do not support their claim that the federal district courts have general power to issue mandatory orders. The authority of the courts to direct the liquor law officials to grant licenses or to cancel revocations was based on the express statutory authority contained in Title II, Sections 5, 6, and 9

[51] At 129 F. 2d 15, the Court of Appeals discussed the many provisions of the Railway Labor Act expressly providing mandatory relief.

of the National Prohibition Act, 41 Stat. 309–312, 27 U. S. C. (1925 Ed.) 14, 16, 21. Those sections provided that the denial or revocation of licenses could be reviewed by appropriate proceedings in or before a court of equity. These review provisions conferred upon the courts, by necessary implication, the power to direct the grant or restoration of a license improperly withheld or revoked.[52]

We conclude that the authorities collected by respondents merely confirm our position that mandatory relief is not available in the federal courts outside the District of Columbia unless authorized by statute; and that it cannot be implied from the mere grant of a right or the imposition of a duty.

F. THE COURT OF APPEALS IMPROPERLY DIRECTED THE ENTRY OF SUMMARY JUDGMENT

Respondents try to create the impression that the entry by the Court of Appeals of summary judgment in their favor was the just reward for petitioner's alleged attempt to confuse the proceedings by moving to dismiss for lack of jurisdiction after respondents had moved for summary judgment. Actually, respondents are the ones guilty of disregard for orderly procedure by moving for summary judgment before petitioner's time to file a responsive pleading had expired—and before they themselves even had sufficient evidence, as is shown by the extensive recovery proceedings initiated by them (Main Brief, pp. 131–132).

[52] We have not had an opportunity to analyze the cases cited in the Student Note in the 1938 volume of *Columbia Law Review* (Respondents' Brief, p. 164). Many of them seem to be Prohibition cases.

Their argument that the District Court granted summary judgment to petitioner is based on what respondents urged the District Judge to do, not on what he did. As we have shown in our Main Brief (pp. 24, 132–133), the District Judge twice extended the time to answer the motion for summary judgment—first, until argument of the motion to dismiss (R. 207–208), and subsequently until disposition of that motion (R. 212–213). He expressly stated that he would limit his decision to the jurisdictional issues (R. 202, 205), and stressed that it would be impossible to pass on the motion for summary judgment before petitioner had answered it in full.[53] Respondents' own argument (at p. 171 of their brief) shows that their motion papers for summary judgment were before the District Court not as a motion but as answering papers to petitioner's motion to dismiss.[54] Nor did the District Court's disposition of the motion indicate that it disposed of the merits of the case. True, the judge discussed some of the basic facts, and to that extent he assumed jurisdiction to determine his juris-

[53] The court's remark, "I do not see how he can be prepared to grant you relief until he knows they have exhausted their proof" (R. 206), indicates that he did not consider the 10-page Colby affidavit in support of the motion to dismiss as a full answer to respondents' motion for summary judgment. *Central Mexico Light & Power Co.* v. *Munch*, 116 F. 2d 85 (C. A. 2) (cf. Respondents' Brief, p. 172), holds expressly that a motion to dismiss for lack of jurisdiction may be made upon affidavits and that the making of such a speaking motion does not preclude a dismissal upon jurisdictional grounds.

[54] As such, they constituted, of course, a part of the record on appeal.

diction. It is elementary, however, that this does not constitute an adjudication on the merits.[55]

In any event, the case was not ripe for an adjudication on the merits. Respondents' own Statement of Facts and Part One of its argument in this Court establish that, even in respondents' view, petitioner's duty to lower its rates rests on a host of highly controversial factual issues [56]—not to mention the circumstance that respondents now rely heavily on petitioner's supposed failure to charge "just and equitable" tolls, an allegation which is not even contained in their complaint.

G. THE COURTS LACK JURISDICTION OVER RESPONDENTS' CLAIM FOR PAST OVERCHARGES

If we are right that the courts do not have jurisdiction to grant prospective relief with respect to the Canal tolls, it necessarily follows that respondents cannot, by indirection, obtain the same result in the guise of a refund of tolls collected in the past. But even if we are wrong in our argument as to prospective relief, there are several reasons why respondents still cannot recover for past tolls.[57] In the first place,

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[55] A ruling on respondents' standing to sue goes to a jurisdictional issue in the normal usage of that term. *Osborn* v. *The Bank of the United States*, 9 Wheat. 738, 819; *Fairchild* v. *Hughes*, 258 U. S. 126, 129; *Joint Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 150 (concurring opinion); *United States* v. *Storer Broadcasting Co.*, 351 U. S. 192, 197.

[56] In an effort to prove these "facts", respondents append to their brief in this Court an appendix of fifty pages, most of which is not included in the record.

[57] If respondents actually were entitled to prospective relief, the proper way to attack the tolls would have been by mandamus or injunction, if necessary by obtaining interlocutory

the argument that the courts have jurisdiction over their claim for a refund of excessive tolls paid in the past falls with their assumption that the President's role in the statutory plan is negligible and limited to that of a clerical supervisor of the petitioner's cost computations. We have shown that this is not the case. The President is to act as President and to determine the tolls not merely on the basis of arid computations and their effect on the shipping industry, but to take into account that the United States operates the Canal under a "mandate from civilization" [58] as a whole. This interpretation of Sections 411 and 412 does not mean that the President may "disobey" the toll formula, but that the statute directs him to take into account, in addition, factors outside those enumerated in Section 412 (*supra*, pp. 27–28). The President thus is the true promulgator of the toll rates, and petitioner a technical advisor. If the

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orders. Respondents cannot pay the tolls and thereafter ask for a refund. *Commissioner of Internal Revenue* v. *National Lead Company*, 230 F. 2d 161, 165 (C. A. 2), affirmed on other grounds, 352 U. S. 313.

In any event, since the complaint does not allege that any tolls have been paid under protest, it may well be that the doctrine of the non-recoverability of voluntary payments to the Federal Government precludes their recovery. *E. g.*, *United States* v. *Edmondston*, 181 U. S. 500; *Chesebrough* v. *United States*, 192 U. S. 253; see also *Callanan Road Improvement Co.* v. *United States*, 345 U. S. 507.

[58] Respondents' Brief, p. 12.

statute is thus construed, it is obvious that the President is an indispensable party to a suit for a refund.[59]

Respondents' damage claim must also fail for lack of a duty owed *to them* by petitioner. Respondents claim that Congress created "between shipowners and defendant [petitioner] legal relationships".[60] We have pointed out in our Main Brief and above that duties in this area are owed to "superior executive and legislative authority"[61] or to the public as a whole, not to the users individually or as a class.[62]

Respondents, finally, take the position that, in spite of the express statutory command that any toll changes are to be prospective,[63] retroactive refunds must be awarded because of the delays in the rate-fixing procedure, and because otherwise respondents would be deprived of the benefit of the toll formula during the period consumed by the rate determination. There is nothing unusual to respondents' position. Many regulatory statutes provide that a utility may charge only—and is entitled to—a reasonable rate, and that a rate which is not just or reasonable is unlawful.[64] Still, these statutes, like Section 411, commonly provide only

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[59] Considering the true role and responsibility of the President in the statutory scheme, there is little merit to the argument that petitioner has prevented the President from acting by failing to submit new tolls for his approval. The President, of course, has ample powers to compel action by petitioner.

[60] Respondents' Brief, p. 184.

[61] *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 129.

[62] *Supra* and Main Brief, pp. 123–127.

[63] Main Brief, p. 140.

[64] See, *e. g.*, Federal Power Act, Section 205 (a), 49 Stat. 851, 16 U. S. C. 824d; Natural Gas Act, Section 4, 52 Stat. 822, 15 U. S. C. 717c.

for a prospective rate determination,[65] although it is well known that rate proceedings are protracted. The failure to make a rate increase retroactive, thereby depriving the utility of a compensatory rate during the period during the new rate was suspended, does not violate the constitutional guarantees against confiscation. *Hope Natural Gas Co.* v. *Federal Power Commission,* 196 F. 2d 803 (C. A. 4). It is recognized that such lag is inevitable and may benefit the user or the utility, depending on whether the rates are being increased or decreased. Respondents benefited from a similar suspension from 1948 until 1951,[66] and during this period the Canal did not benefit from the financial relief afforded to it as of July 1, 1951,[67] by the 1950 Act (*supra,* p. 5). Lastly, if the prospective operation of a rate change does not violate the Constitution, it cannot be held to conflict with any obligation under the provisions of the Hay-Pauncefote Treaty.

Respectfully submitted.

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SAMUEL D. SLADE,
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Attorneys.

APRIL 1958.

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[65] See, *e. g.*, Federal Power Act, Section 206 (a), 49 Stat. 852, 16 U. S. C. 824e; Natural Gas Act, Section 5, 52 Stat. 823, 15 U. S. C. 717d.

[66] Main Brief, pp. 13–14.

[67] Act of September 26, 1950, Section 14, Main Brief, p. 169.

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APPENDIX A

THE WHITE HOUSE,
Washington, August 13, 1915.

Hon. LINDLEY M. GARRISON,
Secretary of War.

MY DEAR MR. SECRETARY: With reference to your letter of July 29th, I am sending you herewith the Attorney General's opinion on the subject of Panama Canal tolls. After a copy of this opinion has been made for your files, will you not be good enough to return the original to me?

Sincerely yours,

(Sgd) J. P. TUMULTY,
Secretary to the President.

Enclosure.

DEPARTMENT OF JUSTICE,
Washington, June 3, 1915.

SYNOPSIS OF ATTACHED MEMORANDUM RELATING TO THE QUESTION OF LIABILITY OF UNITED STATES VESSELS TO PAYMENT OF PANAMA CANAL TOLLS

The questions presented are:

1. Are vessels operated by the United States required to pay tolls, under (A) the Panama Canal Act, and (B) the Hay-Pauncefote Treaty, when passing through the Panama Canal.

11. In the event such vessels do not pay tolls, should their tonnage be considered in connection with the establishment of a new toll rate when such a change comes up for consideration.

It is understood from the letter of the Secretary of War, dated April 8, 1915, that the term "vessels oper-

ated by the United States" is intended to be confined to

> vessels operated by the United States, including warships, naval tenders, colliers, transports, hospital ships, and other vessesl owned or chartered by the United States used for transporting troops or supplies. It was not intended, however, to apply to vessels owned by the United States, but operated commercially in competition with other commercial vessels.

The references in this synopsis are to the memorandum on the same subject hereto attached.

I

RELATING TO PAYMENT OF TOLLS

(Memo. pp. 1 to 16)

The questions presented involve consideration of (A) The Panama Canal Act and (B) the Hay-Pauncefote Treaty.

A. Panama Canal Act

(Memo. pp. 1 and 2)

There is no implied or express provision of the Panama Canal Act of August 24, 1912 (37 Stat. 560), as amended by the Act of June 15, 1914, which requires the payment of tolls for vessels operated by the United States, so this phase of the question may be answered in the negative and dismissed without further consideration.

B. Hay-Pauncefote Treaty

(Memo. pp. 2 to 16)

The United States are, by virtue of the Hay-Varilla Treaty of 1903, the practical sovereign of the Panama

Canal Zone. This sovereignty is complete, except as limited by the Hay-Varilla and the Hay-Pauncefote Treaties. The rights of the United States, in so far as the present questions are concerned, are more restricted in every particular by the latter treaty, so that it alone need be considered.

Section 1 of Article III of the Hay-Pauncefote Treaty provides:

> The canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic or otherwise. Such conditions and charges of traffic shall be just and equitable.

The application of this section to the proposal to exempt vessels operated by the United States from the payment of tolls, raises two questions:

1. Would such exemption be a discrimination against other nations or their subjects, and,
2. Would it violate the provisions guarantying just and equitable charges.

1

Discrimination

(Memo. pp. 4–15)

The provisions of the section must be read in the light of (*a*) conditions existing at the time the treaty was negotiated; (*b*) the interpretation given it by the parties; (*c*) the spirit of the treaty; and (*d*) estoppel of Great Britain to claim that the United States should pay tolls on their vessels.

a. Rebus sic stantibus
(Memo. pp. 4 to 8)

All treaties are concluded under the tacit condition *rebus sic stantibus*. At the time this treaty was made the United States had not acquired sovereignty over the Canal Zone. Only, therefore, such rights and obligations were considered by the parties as might, relatively to Great Britain, adhere in the United States, being such as were incident to the ownership and management of a canal to be constructed on foreign soil under rights to be acquired by treaty. Nothing in the treaty or the conditions existing at the time it was negotiated precludes, as far as the question of discrimination is concerned, the use of the Canal, without payment of tolls, by the United States for its vessels operated as governmental agencies.

b. Interpretation by the parties
(Memo. pp. 8 to 13)

The negotiations which resulted in the execution of the treaty and subsequent interpretations by the parties show that the treaty was not intended to limit the right of the United States, after acquiring virtual sovereignty of the Canal Zone, to fortify and protect the Canal and to use it as a national defense.

c. Spirit of the treaty
(Memo. p. 13)

The spirit of the treaty is controlling. The United States being the owner of both vessel and Canal, any payment of tolls would be from itself to itself. This would be a useless formality, the omission of which would not benefit the United States nor injuriously affect other nations. The failure to go through the form of taking money from one Government officer and handing it over to another would not, independently of the

question of equitableness of rates, constitute such a discrimination as is forbidden by the treaty. The spirit of the treaty does not require the performance of a useless formality.

d. Great Britain estopped
(Memo. pp. 13 to 15)

Great Britain was in January, 1913, specifically advised that the United States so interpreted the treaty as to "exempt from the payment of tolls its vessels of war and other vessels engaged in the service of this government." During the long time that has elapsed since this notice was given, Great Britain has failed to object to this interpretation of the treaty and is, therefore, now estopped to challenge its correctness.

Just and Equitable Charges
(Memo. p. 16)

Section 1 of Article III of the treaty provides that "conditions and charges of traffic shall be just and equitable."

It may be strongly urged that the argument relating to sovereignty over the Canal Zone, disposes of this phase of the question also, but, whether it does or not, this provision is not violated as long as the rates charged are limited to an amount representing the fair value of the services rendered. Great Britain claims that this should be limited to the "interest on the capital expended and the cost of the operation and maintenance of the canal." At present, upon this basis or any other fair basis of calculation, it costs the United States, according to the testimony of General Goethals, two or three times as much to transfer a vessel through the Canal as it receives for such services. The present rates, therefore, cannot be considered unjust or inequitable.

II.

RELATING TO CONSIDERATION OF TONNAGE IN ESTABLISHING TOLL RATES

(Memo. p. 17)

For the same reasons that the United States are not required to pay tolls on vessels operated as governmental agencies, they are not required to consider the tonnage of such vessels in connection with the establishment of toll rates.

CONCLUSION

It therefore appears that at present and perhaps for a long time in the future, the passage through the Canal of vessels of war or other vessels used as governmental agencies, as distinguished from those engaged in commercial traffic, without either payment of tolls or consideration of their tonnage in fixing rates, will not violate either the provisions of the Hay-Pauncefote Treaty or the Panama Canal Act.

DEPARTMENT OF JUSTICE,
Washington, June 3, 1915.

MEMORANDUM RELATING TO THE QUESTION OF LIABILITY OF UNITED STATES VESSELS TO PAYMENT OF PANAMA CANAL TOLLS

The questions presented are:

1. Are vessels operated by the United States required to pay tolls, under (A) the Panama Canal Act, and (B) the Hay-Pauncefote Treaty, when passing through the Panama Canal.

11. In the event such vessels do not pay tolls, should their tonnage be considered in connection with the establishment of a new toll rate when such a change comes up for consideration.

It is understood from the letter of the Secretary of War, dated April 8, 1915, that the term "vessels operated by the United States" is intended to be confined to

> vessels operated by the United States, including warships, naval tenders, colliers, transports, hospital ships, and other vessels owned or chartered by the United States used for transporting troops or supplies. It was not intended, however, to apply to vessels owned by the United States, but operated commercially in competition with other commercial vessels.

I

RELATING TO PAYMENT OF TOLLS

A. Under Panama Canal Act

There is no implied or express provision of the Panama Canal Act of August 24, 1912 (37 Stat. 560), as amended by the Act of June 15, 1914, which requires the payment of tolls for vessels operated by the United States, so this phase of the question may be answered in the negative and dismissed without further consideration.

B. Under the Hay-Pauncefote Treaty

The United States are, by virtue of the Hay-Bunau-Varilla Treaty of 1903, the practical sovereign of the Panama Canal Zone.

A sovereign has exclusive control of a canal built through its own territory at its own expense. It may exclude foreign vessels at discretion or admit them upon any conditions it may impose, unless restricted by treaty obligations. Examples of such canals are the Kiel and Corinth Canals.

The United States, therefore, have complete control

over the Panama Canal and may exercise same in any way desired, except where restricted by treaties.

The United States have made several treaties which affect their control of the Canal, but inasmuch as their rights, in so far as the present questions are concerned, are more restricted in every particular in the Hay-Pauncefote Treaty than any other, this discussion may be limited to a consideration of the latter treaty.

By this treaty the United States and Great Britain agreed that the Clayton-Bulwer Treaty should be superseded "without impairing the 'general principle' of neutralization established in Article VIII" thereof.

The "general principle" of neutralization referred to was not neutralization in its strict and technical sense, but only the principle of joint protection of the Canal by the two countries and equality of treatment between "the citizens and subjects of the United States and Great Britain" and "the citizens and subjects of every other State which is willing to grant thereto such protection as the United States and Great Britain engage to afford."

> If the wording of the Article (Article VIII) is examined, it will be seen that there is no mention of belligerent action in it at all. Joint protection and equal treatment are the only matters alluded to and it is to one, or both, of these that neutralization must refer. (Letter from Secretary of State for Foreign Affairs of Great Britain to Ambassador Bryce, November 14, 1912.)

The element of joint protection was expressly superseded, it being one of the purposes of the Hay-Pauncefote Treaty to vest in the United States the right of exclusive control and management and also the duty alone to protect the Canal.

So it results that the only element of the "general

principle of neutralization" referred to in the Clayton-Bulwer Treaty which was preserved in the Hay-Pauncefote Treaty was equality among citizens and subjects of all nations, which does not enter into the question here under consideration.

Our present investigation may be restricted, therefore, to a consideration only of the limitations placed upon the United States by the Hay-Pauncefote Treaty. These limitations, being in derogation of sovereign rights are, under the rules of international law, to be construed strictly.

> Whether they be customary or contractual in their origin, they must be construed strictly. If therefore a dispute occurs between a territorial power and a foreign power as to the extent or nature of rights enjoyed by the latter within the territory of the former, the presumption is against the foreign state, and upon it the burden lies of proving its claim beyond doubt or question. (Hall's International Law, 6th Ed., 1909, p. 159.)

Section 1 of Article III of the Hay-Pauncefote Treaty provides:

> The canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic or otherwise. Such conditions and charges of traffic shall be just and equitable.

The application of this Section to the proposal to exempt vessels operated by the United States from the payment of tolls, raises two questions:

> 1. Would such exemption be a discrimination against other nations or their subjects, and
> 2. Would it violate the provisions guarantying just and equitable charges?

1

Discrimination

The provisions of the section must be read in the light of (*a*) conditions existing at the time the treaty was negotiated; (*b*) the interpretation given it by the parties; (*c*) the spirit of the treaty; and (*d*) estoppel of Great Britain to claim that the United States should pay tolls on their vessels.

a. Rebus Sic Stantibus

All treaties are concluded under the tacit condition *rebus sic stantibus*. At the time this treaty was made the United States had not acquired sovereignty over the Canal Zone. Only, therefore, such rights and obligations were considered by the parties as might, relatively to Great Britain, adhere in the United States, being such as were incident to the ownership and management of a canal to be constructed on foreign soil, under rights to be acquired by treaty.

This is manifest from the following excerpt from the letter of the Marquis of Lansdowne to Lord Pauncefote, dated February 22, 1901, with reference to the exclusion of a proposed amendment, similar to Article X of the Suez Canal Convention, which provided that the rules guarantying the inviolability of the Canal should not "apply to measures which the United States may find it necessary to take for securing by its own forces the defense of the United States and the maintenance of public order."

> It is, I understand, contended in support of the Senate Amendment that the existence of the above provisions in the Suez Canal Convention justifies the demand now made for the insertion of analogous provisions in regard to the proposed Nicaragua Canal.
>
> But the analogy which it has been attempted to set up fails in one essential particular. The

> banks of the Suez Canal are within the dominions of a territorial sovereign, who was a party to the Convention, and whose established interests it was necessary to protect, whereas the Nicaragua Canal will be constructed in territory belonging not to the United States, but to Central American states, of whose sovereign rights other powers cannot claim to dispose.

It is clear, therefore, that the United States, though not expecting to derive from the treaty with Great Britain the right to use the Canal as a national defense, nevertheless took the precaution not to foreclose, by the treaty with Great Britain, the right to so use the Canal provided they became the sovereign thereof or secured such right from the territorial sovereign. While the particular amendment above referred to was not adopted, the failure to incorporate its provisions in the treaty was not due, as we shall later see, to the surrender of the principle, but because it was conceded by Great Britain, in notes interpreting the treaty, that this right was already reserved to the United States by the treaty and that the amendment was therefore unnecessary.

It will not be presumed, therefore, that the United States, at a time they were not possessors of the territory through which the Canal would pass, intended to deprive themselves of the right to take such measures as might be necessary for securing the defense, not only of the Canal Zone, but also of the United States, should they become sovereign of such territory or secure from its sovereign treaty rights permitting such action. Indeed, the United States, as sovereign of the Canal Zone, could protect the Canal, if a belligerent, only by defending the Nation.

> The consent of a State to a treaty presupposes a conviction that such treaty is not fraught with danger to its existence and devel-

opment, and implies a condition that, if by an unforeseen change of circumstances the obligations stipulated in the treaty should imperil the said State's existence and necessary development, the treaty, although by its nature unnotifiable, should nevertheless be notifiable. (1 Oppenheim, International Law (1912), Sec. 539.)

Prior to the making of this treaty the United States, through her public men, had repeatedly proclaimed their purpose in undertaking the construction of an Isthmian Canal.

> Without urging further the grounds of my opinion, I repeat, in conclusion, that it is the right and duty of the United States to assert and maintain such supervision and authority over any interoceanic canal across the Isthmus that connects North and South America as will protect our national interests. (Excerpt from Message of President Hayes, March 8, 1880, p. 4991 of Vol. 33, part 6, Cong. Rec.)
>
> It is as regards the political control of such a canal as distinguished from its merely administrative or commercial regulation, that the President feels called upon to speak with directness and with emphasis. During any war to which the United States of America or the United States of Colombia might be a party, the passage of armed vessels of a hostile nation through the Canal of Panama would be no more admissible than would be the passage of the armed forces of a hostile nation over the railway lines joining the Atlantic and Pacific shores of the United States or of Colombia. And the United States of America will insist upon her right to take all needful precautions against the possibility of the Isthmus transit being in any event used offensively against her interests upon the land or upon the sea. (Excerpt from letter, dated June 24, 1881, addressed by Secretary of State Baline to Mr.

Lowell, United States Minister at London, Vol. 33, part 6, p. 4991, Cong. Rec.)

In a memorandum prepared by the Secretary of State and sent to the Senate, while the confirmation of the treaty was under consideration, Mr. Hay said:

> No longer insisting upon the language of the Davis amendment—which had in terms reserved to the United States express permission to disregard the rules of neutrality prescribed, when necessary to secure its own defense, which the Senate had apparently deemed necessary because of the provision in Rule 1, that the canal should be free and open "in time of war as in time of peace" to the vessels of all nations, it was considered that the omission of the words "in time of war as in time of peace" would dispense with the necessity of the amendment referred to, and that war between the contracting parties, or between the United States and any other power would have the ordinary effect of war upon treaties when not specially otherwise provided, and would remit both parties to their original natural right of self-defense and give to the United States the clear right to close the canal against the other belligerent, and to protect it and defend itself by whatever means might be necessary. (Senate Doc. No. 746, 61st Cong. 3d Sess.)

By such statements, and many others like them, Great Britain, at the time the treaty was executed, was put upon notice that the United States were seeking such control over the Canal as would make it available as one of the national defenses of the country, and, therefore, the treaty should be interpreted as vesting such right in the United States, in the event they obtained from the sovereign of the soil the right to so use the Canal.

> If two meanings of a stipulation are admissible according to the text of a treaty, such

> meaning is to prevail as the party proposing the stipulation knew at the time to be the meaning preferred by the party accepting it. (1 Oppenheim, International Law (1912), Sec. 554 (8).)
>
> If, therefore, the meaning of a stipulation is ambiguous, such meaning is to be preferred as is less onerous for the obliged party, or as interferes less with the parties' territorial and personal supremacy, or as contains less general restrictions upon the parties. (1 Oppenheim, International Law (1912), Sec. 554 (4).)
>
> It is a canon of interpretation to so construe a law or a treaty as to give effect to the object designed, and for that purpose all of its provisions must be examined in the light of attendant and surrounding circumstances. (Field, *J.* in *In re Ross* (1896), 140 U. S. 453, 475.)
>
> (See also *Ware* v. *Hylton*, 3 Dall. 199, 249; and *United States* v. *Texas*, 162 U. S. 1, 27.)

b. Interpretation by the parties

The rights which the United States were to have under the treaty as owner and constructor of the Canal are set out in Article II as follows:

> subject to the provisions of the present treaty, the said Government shall have and enjoy all the rights incident to such construction, as well as the exclusive right of providing for the regulation and management of the canal.

This Article presupposes, in addition to the right to provide for the regulation and management of the Canal, other rights in the United States which were not prohibited by the provisions of the treaty.

These other rights, thus reserved to the United States, include all of those, not expressly prohibited, which might appertain to the United States under the conditions then existing or which might accrue by virtue of transfer to them of the sovereignty of the State

owning the territory through which the Canal might pass. When, therefore, the United States, already the sole protector of the Canal, became also the sovereign of the Canal Zone, the treaty was henceforth to be considered in the light of such changed conditions and not to deprive the United States of the exercise, on such territory, of the sovereign right, acquired with the ownership of the Zone, to use same in self-defense.

This has been conceded by Great Britain, as above stated, in the interpretation put upon the treaty in notes exchanged while the parties were negotiating same and also during the exchange of notes relative to the act exempting coastwise vessels from payment of tolls.

In the first draft of the treaty, as ratified by the United States Senate, there was a provision that certain stipulations guarantying the inviolability of the Canal shall not "apply to measures which the United States may find it necessary to take for securing by its own forces the defense of the United States and the maintenance of public order." Section 1 of Article III of this draft of the treaty provided:

> The canal shall be free and open, in time of war as in time of peace, to the vessels of commerce and of war of all nations, on terms of entire equality.

The negotiations between the two Governments which resulted in striking the words "in time of war as in time of peace," from Section 1 of Article III, as well as the provision which exempted the United States from the observance of the stipulations of sections one to five inclusive of Article III, show that it was understood that the removal of both of these provisions, together with another provision, forbidding the United States to fortify the Canal, gave the United

States the right to fortify same and to use and control it, if a belligerent, in any way it might deem necessary for the defense of the Canal and the Nation, while at the same time allowing to neutral powers the passage of their vessels, if it did not interfere with the defensive measures adopted.

This is shown by the following excerpts from the notes exchanged during such negotiations.

> 7. The various points connected with the defense of the canal may conveniently be considered together. In the present draft the Senate Amendment has been dropped, which left the United States at liberty to apply such measures as might be found "necessary to take for securing by its own forces the defense of the United States." On the other hand, the words "in time of war as in time of peace" are omitted from rule 1, and there is no stipulation, as originally in rule 7, prohibiting the erection of fortifications commanding the canal or the waters adjacent.
>
> I do not fail to observe the important difference between the question as now presented to us and the position which was created by the amendment adopted in the Senate:
>
> In my despatch I pointed out the dangerous ambiguity of an instrument of which one clause permitted the adoption of defensive measures, while another prohibited the erection of fortifications. It is most important that no doubt should exist as to the intention of the contracting parties. As to this, I understand that by the omission of all reference to the matter of defense the United States Government desire to reserve the power of taking measures to protect the canal, at any time when the United States may be at war, from destruction or damage at the hands of an enemy or enemies. On the other hand, I conclude that, with the above exception, there is no intention to derogate from

the principles of neutrality laid down by the rules. As to the first of these propositions I am not prepared to deny that contingencies may arise when, not only from a national point of view, but on behalf of the commercial interests of the whole world, it might be of supreme importance to the United States that they should be free to adopt measures for the defense of the canal at a moment when they were themselves engaged in hostilities.

It is also borne in mind that, owing to the omission of the words under which this country became jointly bound to defend the neutrality of the canal, and the abrogation of the Clayton-Bulwer treaty, the obligations of Great Britain would be materially diminished.

This is a most important consideration. In my despatch of the 22d February I dwelt upon the strong objection entertained by His Majesty's Government to any agreement under which, while the United States would have a treaty right to interfere with the canal in time of war, or apprehended war, Great Britain alone, in spite of her vast possessions on the American continent and the extent of her interests in the East, would be absolutely precluded from resorting to any such action, or from taking measures to secure her interests in and near the canal. The same exception could not be taken to an arrangement under which, supposing that the United States, as the power owning the canal and responsible for the maintenance of its neutrality, should find it necessary to interfere temporarily with its free use by the shipping of another power, that power would thereupon at once and *ipso facto* become liberated from the necessity of observing the rules laid down in the new treaty. (Memorandum of the Marquis of Lansdowne, dated August 3, 1901, and enclosed with letter of August 3, 1901, addressed to Mr. Lowther by the Marquis of Lansdowne.)

I notice that in the course of the debate in the Senate on the Panama Canal Bill the argument was used by one of the speakers that the third, fourth, and fifth rules embodied in article 3 of the treaty show that the words "all nations" cannot include the United States, because, if the United States were at war, it is impossible to believe that it could be intended to be debarred by the treaty from using its own territory for revictualling its war-ships or landing troops.

The same point may strike others who read nothing but the text of the Hay-Pauncefote Treaty itself, and I think it is therefore worth while that I should briefly show that this argument is not well founded.

The Hay-Pauncefote Treaty of 1901 aimed at carrying out the principle of the neutralization of the Panama Canal by subjecting it to the same regime as the Suez Canal. Rules 3, 4, and 5 of article 3 of the treaty are taken almost textually from articles 4, 5, and 6 of the Suez Canal Convention of 1888. At the date of the signature of the Hay-Pauncefote Treaty the territory, on which the Isthmian Canal was to be constructed, did not belong to the United States, consequently there was no need to insert in the draft treaty provisions corresponding to those in articles 10 and 13 of the Suez Canal Convention, which preserve the sovereign rights of Turkey and of Egypt, and stipulate that articles 4 and 5 shall not affect the right of Turkey, as the local sovereign, and of Egypt, within the measure of her autonomy, to take such measures as may be necessary for securing the defense of Egypt and the maintenance of public order, and, in the case of Turkey, the defense of her possessions on the Red Sea.

Now that the United States has become the practical sovereign of the Canal, His Majesty's Government do not question its title to exercise belligerent rights for its protection. (Letter of Secretary of State for Foreign Affairs of Great

> Britain to Ambassador Bryce, dated November 14, 1912; handed to Secretary of State by British Ambassador December 9, 1912.)

One other Article alone of the Hay-Pauncefote Treaty need be considered, that is Article IV, which reads as follows:

> It is agreed that no change of territorial sovereignty or of international relations of the country or countries traversed by the beforementioned canal shall affect the general principle of neutralization or the obligation of the high contracting parties under the present treaty.

This Article does not mean that change of sovereignty shall destroy sovereign rights not in the contemplation of the parties at the time the treaty was made, but only that such change, whether to the United States or to a third party, would not affect the obligations assumed by the United States. It had no reference to the sovereign right of self-protection, and that right, as appurtenant to the soil, continued to exist, though sovereignty was transferred to the United States. Furthermore, the only "general principle of neutralization," preserved in the Hay-Pauncefote Treaty, as we have seen, was equality among citizens and subjects of all nations, which has no application to the question now under consideration, and therefore the above conclusions are not affected by this Article of the treaty.

This right freely to use the Canal at all times for the passage of their war vessels and to deny same to a belligerent enemy, therefore, is absolute in the United States, and it appears, independently of the question of tolls, that such use will not constitute a discrimination against other nations as that word is used in Section 1 of Article III.

c. Spirit of the treaty

We pass then to the question whether such use with exemption from tolls would constitute such discrimination.

Assuming that just and equitable toll rates have been prescribed, even if the strict letter of the treaty required payment of tolls for vessels operated by the United States as purely governmental agencies, the spirit of the treaty would not make such payment necessary, because it would be an ineffective and useless thing, benefiting no one, to require the owners of the Canal to pay themselves. The Government would merely be taking money from one hand and putting it into the other, a formality which no nation would insist upon.

The case of the Government paying tolls to itself for the passage of its own vessels is very different from requiring payment of tolls by private owners of vessels engaged in the coastwise trade, since in such case the party paying is different from the one receiving.

d. Great Britain estopped

Furthermore, it would seem that Great Britain is estopped to claim that the United States should pay toll on their vessels.

The United States interpretation of the treaty exempting its vessels of war and other vessels engaged in the service of the Government has been formally presented to the British Government in the following words:

> It is not believed, however, that in the objection now under consideration Great Britain intends to question the right of the United States to exempt from the payment of tolls its vessels of war and other vessels engaged in the service of this Government. Great Britain does not

> challenge the right of the United States to protect the canal. United States vessels of war and those employed in government service are a part of our protective system. By the Hay-Pauncefote Treaty we assume the sole responsibility for its neutralization. It is inconceivable that this Government should be required to pay canal tolls for the vessels used for protecting the canal, which we alone must protect. The movement of United States vessels in executing governmental policies of protection are not susceptible of explanation or differentiation. The United States could not be called upon to explain what relation the movement of a particular vessel through the canal has to its protection. The 'British' objection, therefore, is understood as having no relation to the use of the canal by vessels in the service of the United States Government. (Excerpt from letter dated January 17, 1913, from Secretary of State Knox to Irwin B. Laughlin, American Charge d' Affaires.)

This letter was answered by a note from Ambassador Bryce to the Secretary of State, dated February 27, 1913, but no reference was made to the position taken in the above excerpt, nor has any subsequent answer thereto been made. In this note, Ambassador Bryce said:

> and better also that when vessels begin to pass through the great waterway in whose construction all the world has been interested there should be left subsisting no cause of difference which could prevent any other nation from joining without reserve in the satisfaction the people of the United States will feel at the completion of a work of such grandeur and utility.

It is true, however, that Ambassador Bryce, in this note, said that "His Majesty's Government are unable before the Administration leaves office to reply fully

to the arguments contained in your despatch of the 17th ultimo to the United States Charge d' Affaires at London," but this reservation is probably nullified by failure, during the long intervening time, to object to Secretary Knox's interpretation of the treaty.

It would seem, therefore, that the British Government is estopped to deny the correctness of Secretary Knox's interpretation of the treaty, since no exception has been taken to such interpretation and presumably no subsisting cause of difference was left unsettled when vessels began to pass through the Canal.

Since estoppels are more or less technical, their scope should probably be restricted to the exact matter affected. If this is done in the instant case, even though an estoppel is established, Great Britain might claim that it was restricted to the matter of exemption from the payment of tolls and not necessarily extended to the claim of exemption from considering the tonnage of such vessels in fixing toll rates, since no mention of this question is made by Secretary Knox. In fact, the difficulties mentioned by him would not be present in the consideration of the tonnage of Government vessels in fixing toll rates, for a reasonable amount could be set aside to cover the defense of the Canal, as distinguished from the defense of the United States, should this be deemed a proper charge in determining what was a just and equitable rate.

This leads us to a consideration of another clause in Article III, which bears upon the subject of just and equitable rates.

2

Just and Equitable Charges

The provision referred to is as follows:

> Such conditions and charges of traffic shall be just and equitable.

This raises the question as to what would be just and equitable charges for the service of passing vessels through the Canal for foreign nations and citizens of all nations.

The British Government has placed the following interpretation upon this clause:

> The purpose of these words was to limit the tolls to the amount representing the fair value of the services rendered, i. e., to the interest on the capital expended and the cost of the operation and maintenance of the Canal. (Letter from the Secretary for Foreign Affairs of Great Britain to Ambassador Bryce, November 14, 1912.)

It may be strongly urged that the argument relating to sovereignty over the Canal Zone disposes of this question also, but, whether it does or not, it is not necessary in this connection to discuss what would be a just and equitable rate, because the facts as they exist at present, show that the rates prescribed are more than just and equitable to other nations, since, upon the basis suggested by Great Britain or any other fair basis of calculation, it costs the United States Government two or three times as much to transfer a vessel through the Canal as it received for such services. (See testimony of Gen. Goethals, Hearings Before Committee on Interstate and Foreign Commerce, House of Representatives, Vol. 1, p. 410 et seq.)

Since the rate fixed by the United States, regardless of how determined is just and equitable, no foreign nation has at this time any right to complain.

II

RELATING TO CONSIDERATION OF TONNAGE IN ESTABLISHING TOLL RATES

For the same reasons that the United States are not required to pay tolls on vessels operated as governmental agencies, they are not required to consider the tonnage of such vessels in connection with the establishment of toll rates.

CONCLUSION

It therefore appears that at present and perhaps for a long time in the future, the passage through the Canal of vessels of war or vessels used as governmental agencies, as distinguished from those engaged in commercial traffic, without either payment of tolls or consideration of their tonnage in fixing rates, does not violate either the provisions of the Hay-Pauncefote Treaty or the Panama Canal Act.

WAR DEPARTMENT,
Washington, July 14, 1931.

The GOVERNOR OF THE PANAMA CANAL,
Balboa Heights, Canal Zone.

DEAR SIR: There is inclosed herewith a copy of a letter addressed to me by the President under date of the 9th instant, together with a copy of the opinion from the Acting Attorney General received therewith, dated the 8th instant, holding that the U. S. S. PROCYON while being operated by the State of New York as a training ship of a nautical school may be exempted from the payment of tolls when passing through the Panama Canal. You are accordingly authorized and directed to permit the passage of the

U. S. S. PROCYON through the Panama Canal without payment of tolls, and to permit the free passage in the future of vessels in similar status.

Yours very truly,

PATRICK J. HURLEY,
Secretary of War.

Inclosures:
Copy of President's ltr. 7–9–31;
Copy of Actg. Atty. Gen's. opinion 7–8–31.

THE WHITE HOUSE,
Washington, July 9, 1931.

The Honorable The SECRETARY OF WAR,
Washington, D. C.

MY DEAR MR. SECRETARY: Please find enclosed herewith an opinion from the Attorney General. I would be glad if the War Department would act in accordance therewith.

Yours faithfully,

HERBERT HOOVER.

JULY 8, 1931.

The PRESIDENT,
The White House.

MY DEAR MR. PRESIDENT: I have the honor to comply with your request of June 11 for my advice and opinion on the question whether authority exists in or may be granted to the Governor of the Panama Canal to permit the passage of the U. S. S. PROCYON through the Panama Canal free of tolls. The PROCYON is a vessel of the Navy which the Secretary of the Navy contemplates furnishing to the State of New York to be used as a training ship of a nautical school in accordance with the provisions of the Act of March 4, 1911, c. 265, 36 Stat. 1353 (U. S. C. Title 34, secs. 1121–1123). The ques-

tion is whether this vessel is or may be exempt from the payment of toll while being operated by the State of New York. The letter from the Secretary of the Navy to the Secretary of War dated June 4, 1931, of which you sent me a copy, states that this vessel is owned by the Federal Government, which contributes a considerable portion of its cost of maintenance, that it is not engaged in commercial traffic, and that the benefits of its operation accrue to the American merchant marine at large and thereby to the country as a whole.

Two questions arise. The first is whether the United States is obligated by the provision of any treaty to collect a toll on the passage of this vessel through the Panama Canal.

I have asked the Department of State for an expression of its views upon the possible bearing of any treaty on the question. The Acting Secretary has written me that he is of the opinion that no treaty prevents such exemption. His conclusion is supported by a memorandum prepared by the Counselor of the Department of State on October 16, 1914, for the use of the President, in regard to the effect of the Hay-Pauncefote Treaty of 1901. I agree that neither this treaty nor any other treaty of which I am aware prevents the exemption of this vessel from the payment of toll.

The second question is whether any statute prevents such exemption. The Panama Canal Act, approved August 24, 1912, c. 390, 37 Stat. 560, 562, as amended by the Act of June 15, 1914, c. 106, 38 Stat. 385 (U. S. C. Title 48, sec. 1315), contains the following provisions:

> The President is authorized to prescribe and from time to time change the tolls that shall be levied by the Government of the United States

for the use of the Panama Canal: *Provided,* That no tolls, when prescribed as above, shall be changed, unless six months' notice thereof shall have been given by the President by proclamation.

Tolls may be based upon gross or net registered tonnage, displacement tonnage, or otherwise, and may be based on one form of tonnage for warships and another for ships of commerce. The rate of tolls may be lower upon vessels in ballast than upon vessels carrying passengers or cargo. When based upon net registered tonnage for ships of commerce the tolls shall not exceed $1.25 per net registered ton, nor be less than 75 cents per net registered ton, subject, however, to the provisions of article 19 of the convention between the United States and the Republic of Panama, entered into November 18, 1903. If the tolls shall not be based upon net registered tonnage, they shall not exceed the equivalent of $1.25 per net registered ton as nearly as the same may be determined, nor be less than the equivalent of 75 cents per net registered ton. The toll for each passenger shall not be more than $1.50.

The Act does not expressly prohibit or provide for the exemption of any vessel from the payment of toll, and it was originally thought that tolls should be collected upon the passage of all vessels, without excepting vessels of the United States Navy. But Attorney General Gregory advised President Wilson in an informal memorandum of June 3, 1915, "to the effect that vessels operated by the United States, including warships, naval tenders, colliers, transports, hospital ships, and other vessels owned or chartered by the United States for transporting troops or supplies, are not required to pay tolls either under the provisions of the Panama Canal Act or of the Hay-Pauncefote Treaty." Since that time, I am informed

that vessels within the above mentioned category have not been required to pay tolls. There is no reason why the exemption may not be extended to a vessel like the PROCYON, which is owned by the United States Government and is not engaged in commercial traffic.

There remains for consideration the question whether the Governor of the Panama Canal now has authority to permit its passage through the Canal free of toll. The Proclamations of President Taft and President Wilson in regard to the tolls to be paid by vessels using the Panama Canal indicate that such vessels should pay tolls, and I am informed that in practice they are so construed at the present time. As the power over tolls is vested in the President, you may authorize the Governor of the Panama Canal to exempt this vessel and similar vessels from the payment of tolls. In 1915 such authorization was apparently effected by an informal letter from the President to the Secretary of War. The action taken at that time is a precedent for a similar form of authorization in the matter now under consideration, and I consequently advise you that if you desire to make such an authorization, it will not be necessary for you to give notice thereof by proclamation or otherwise.

Respectfully,

JOHN LORD O'BRIAN,
Acting Attorney General.

APPENDIX B

PANAMA CANAL COMPANY,
OFFICE OF THE PRESIDENT,
Balboa Heights, Canal Zone, March 26, 1958.

Memorandum to Secretary, Panama Canal Company:

In reply to your radio NR 51 of March 25, which states in part that the Grace Line brief says that the Panama Canal Company uses its annual report of the Board of Directors to the Stockholder as an official report and conceals certain statistical information, I submit the following explanatory remarks.

In the last paragraph of the narrative section of the 1957 annual report to the Stockholder (page 13), I state as follows:

> It is impossible to include comprehensive coverage of the Company's varied operations and major activities of the Board of Directors in a brief report of this type. We have, therefore, presented here only the highlights of the year's operations and the principal financial reports and operating statistics which follow. More detailed information will be presented in the regular agency report which will be published at a later date.

This statement certainly refutes the idea that the Company represents the report to the Stockholder as its official report and conceals certain statistical information.

The annual report to the Stockholder was first issued for fiscal year 1956 as a result of repeated requests from the Company's Board of Directors for a summary of the year's operations prior to the time

that the regular agency report could be prepared and printed. Distribution to various committees of Congress, heads of various Government agencies and principal shipping companies that use the Canal has materially lessened demands for statistical and financial information and we have had an appreciative response from those who have received the report.

The regular agency report which is printed later in the year is still the official statistical and financial report of the Panama Canal Company/Canal Zone Government agencies. This report contains expanded reports of financial operations and detailed statistical analyses that provide a continuous historical record of Canal operations through the entire period since its establishment in 1914. This detailed agency report is printed as a public document and is mailed free of charge as the official agency report to a wide distribution list, including the principal shipping companies that utilize the Panama Canal. In addition, copies are readily available through the Superintendent of Documents in Washington, D. C.

W. E. POTTER, *President.*

U. S. GOVERNMENT PRINTING OFFICE: 1958

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In the Supreme Court of the United States

OCTOBER TERM, 1957

PANAMA CANAL CO., PETITIONER

v.

GRACE LINE, INC., ET AL.

GRACE LINE, INC., ET AL., CROSS-PETITIONER

v.

PANAMA CANAL CO.

MEMORANDUM FOR THE PANAMA CANAL COMPANY IN ANSWER TO THE REBUTTAL BRIEF FOR GRACE LINE, ET AL.

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
SAMUEL D. SLADE,
HERMAN MARCUSE,
Attorneys,
Department of Justice, Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 251

PANAMA CANAL CO., PETITIONER

v.

GRACE LINE, INC., ET AL.

No. 252

GRACE LINE, INC., ET AL., CROSS-PETITIONER

v.

PANAMA CANAL CO.

MEMORANDUM FOR THE PANAMA CANAL COMPANY IN ANSWER TO THE REBUTTAL BRIEF FOR GRACE LINE, ET AL.

Most of the points in the Rebuttal Brief for the Respondents Grace Line, Inc., et al., filed after the argument, are matters which have been dealt with in our Main and Reply Briefs, and in the oral argument. Respondents' first two points, however, contain new arguments which require further reply.

I

Point I of the Rebuttal Brief reopens an argument with respect to the effect of the Comptroller General's

Audit Report which we had believed settled by a concession in respondents' brief in opposition to our petition for certiorari in No. 251. In that petition we stated that the grant of summary judgment by the Court of Appeals was understandable only on the hypothesis that that court had accepted respondents' theory, asserted in their complaint (par. 10, R. 6) and again in their motion for summary judgment (par. 3, R. 13), that the accounting determinations of the General Accounting Office are final and conclusive on the Panama Canal Company (Petition in No. 251, pp. 37–41). Indeed, we set forth this issue as the second question presented by our petition:

> 2. Whether Sections 105 and 106 of the Government Corporation Control Act impose upon a Government corporation the ministerial duty to comply with the conclusions regarding *accounting, cost allocation, and statutory interpretation* reached by the Comptroller General in his commercial-type audit report. [Petition in No. 251, p. 2; emphasis added.]

The petition thus presented the question of whether the Comptroller General's reports were binding as a matter of law or fact.

Respondents' Brief in Opposition in No. 251 charged that this second question in the petition constituted a "false issue" and made the formal statement (p. 2) that "The Court of Appeals did not hold and the plaintiffs did not maintain or even intimate that the GAO interpretation of the statute as requiring the prescription of tolls without regard to the losses of the collateral activities was binding on defendant".

As the result of this concession, we did not brief the question of the effect of the Comptroller General's Audit Report—whether legal or factual—in our Main Brief (cf. pp. 3, fn. 4, 89–90). Respondents' Main Brief (pp. 58–59) again charged the petitioner with having attempted to raise a false issue in the petition for a writ of certiorari in No. 251. It did not warn that we might have misconceived the scope of the concession.

Now, in their Rebuttal Brief, respondents for the first time make the statement (p. 2) that if "the summary judgment granted by the Court of Appeals is affirmed * * * [they] will then argue to the District Court that the accounts stated by the General Accounting Office of *the Canal operation only*, i. e., as distinguished from the business activities, are binding on the defendant, not because the Court of Appeals so held, but because, in our opinion, the Government Corporation Control Act so requires, once the question of the interpretation of Section 412 (b) has been settled". In other words, respondents now belatedly explain that their concession was limited to the Comptroller General's statutory interpretations, not to his accounting determinations and cost allocations.

If that explanation had been made in respondents' Main Brief, petitioner would have been enabled to address itself to this issue in its Reply Brief. As the matter now stands, the problem has not been fully presented to this Court simply because respondents,

though put on notice, did not explain their true position to petitioner or the Court.[1]

Moreover, respondents' present pronouncement that the accounts stated by the Comptroller General are binding on petitioner is in direct conflict with respondents' complaint in their brief in opposition to certiorari in No. 251 (pp. 2–3) that the Comptroller General could not reach any definite conclusions because petitioner had refused to give him the necessary information. Again, at pp. 58–59 of their Main Brief, respondents take the position that the significance of the Comptroller General's Report is evidentiary, *i. e.*, not binding.[2]

Having thus thwarted proper review in this Court of the question raised in the petition in No. 251 as to the effect of the Comptroller General's report upon petitioner, respondents should not be permitted (if

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[1] In our Petition for a Writ of Certiorari in No. 251, pp. 37–41, 39, fn. 71, we pointed out, without full development of the point, that the Comptroller General's Audit Reports under the Government Corporation Control Act are not, and never were intended to be, binding statements of account under Section 304 of the Budget and Accounting Act of 1921, 42 Stat. 24, 31 U. S. C. 74.

[2] Actually, even the evidentiary value of the Comptroller General's reports is extremely limited. The 1954 Report concedes that its figures are merely tentative (R. 41–42). The Comptroller General's Report for 1956 (H. Doc. 210, 85th Cong., 1st Sess.) used a different method of computation designed to produce "a somewhat more accurate result" but warns that even these results "should not be regarded as exact" (p. 17). See also 1956 Report, p. 18, note c, admitting that the 1954 Report erroneously had allocated to the business activities 75% of the Administrative and General Corporate Expense (cf. R. 54, note c) and that 58.5% was the proper figure.

the occasion should arise) to press these very issues, or some of them, in the District Court in connection with the formulation of a possible judgment and in possible enforcement proceedings.[3]

II.

In Point II of their Rebuttal Brief (pp. 3–4), respondents charge that petitioner's "'ambiguous bookkeeping' has misled its counsel into making incorrect statements in its reply brief". We submit that, on the contrary, our statements are correct, and that it is respondents' argument which discloses inadequacies. We point out the errors in some detail because of the serious charge that petitioner's Reply Brief contains incorrect statements of fact.

Respondents' arguments are that in 1949 petitioner's business activities had earned a profit of $1,173,168 after administrative expenses; that, contrary to our statement in the Reply Brief (p. 13), these activities had failed to earn a similar profit in 1954 but had not even earned their administrative

[3] Respondents accuse us of grasping at straws by stressing their Prayer No. 4 (R. 8, 11) "Enjoining and restraining the defendant in the prescription of tolls from using accounts less favorable to the plaintiffs and their class than those determined by the General Accounting Office" (Brief in Opposition in No. 251, p. 3; Respondents' Main Brief, p. 58, footnote; Rebuttal Brief, pp. 2–3). The fact is that paragraph 4 appears to be a part of the motion for summary judgment which has been granted (cf. R. 257, 258) and petitioner is quite naturally concerned about the consequences of its inclusion in a final judgment. Respondents have not offered to stipulate unambiguously that a judgment to be entered on the motion for summary judgment would not include a clause corresponding to their Prayer No. 4.

expenses; and, finally, that the estimated loss of petitioner's business activities after administrative expenses for the fiscal year 1958 amounts to $3,250,450.

1. In point of time, respondents start out with the proposition that in 1949 petitioner's business activities earned a profit *after* administrative expenses in the amount of $1,173,168. This figure has apparently been obtained by adding to the net profit of the Panama Railroad Company, (*i. e.*, $160,355[4]) the profit of $1,006,959.04 of the business operations of the former Panama Canal Agency, as distinguished from the Panama Railroad Company.[5] It appears, however, that this profit of $1,006,959.04 does not take into account a number of expense items which would now be considered administrative and general expense.[6] Hence, it cannot be called, without qualification, profit after administrative expenses. Moreover, it is significant that these business activities would have suffered a loss of $125,962.76 if they had been charged with interest on the capital investment.[7] The inability of the supporting operations to earn the interest on the capital investment thus is not a new phenomenon caused (as respondents charge) by petitioner's inflation of administrative expenses and ambiguous bookkeeping. In any event, respondents' figure of $1,173,168 does not constitute a clear profit after administrative expenses.

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[4] Petitioner's Main Brief, p. 11, fn. 17; President's Budget for the Fiscal Year 1951, p. 158.

[5] Annual Report of the Governor of Panama Canal, 1949, pp. 28, 97, 104.

[6] *Ibid.*, p. 104, Table 23.

[7] *Ibid.*, pp. 28, 104, Table 23.

2. Respondents also say that the tables at p. 13 of our Reply Brief show that the supporting activities failed to earn their share of administrative expenses. Respondents do not amplify this statement, and it is quite unfounded.

The schedule at p. 13 of the Reply Brief shows an operating income of the Allied Maritime Operations of $1,518,020 and of the Supporting Service Operations of $2,549,197, totalling $4,067,217. The Comptroller General's report for 1954 took the position that the business activities consisting of Allied Maritime Operations and the Supporting Service Operations, having a combined operating income of $4,067,217, should be charged with 75% of the Administrative and Other General Expenses, *i. e.*, with $3,832,363 (R. 53 and 54, note c). Thus, on the basis of the Comptroller General's allocation ratio for 1954, the business activities had a profit after administrative and general expenses of $234,854, and not a loss as claimed by respondents.[8]

The 1956 Report of the Comptroller General, concedes, however, that the 75% allocation of the Administrative and Other General Expenses to the business activities was erroneous and that the proper allocation

[8] Respondents' statement that the Supporting Service Operations had a loss can be understood only on the basis that respondents, misunderstanding the Comptroller General's computations, seek to allocate 75% of the Administrative and Other General Expenses to the operating income of the Supporting Service Operations alone, without taking account of the fact that this 75% allocation refers to *all* business activities, which include both the Allied Maritime Operations and the Supporting Service Operations.

ratio for the entire period from 1952–1956 should have been 41.5% to the Canal operations and 58.5% to the supporting business activities.[9] Using these corrected figures, the Operating Income of the business activities, amounting to $4,067,217, should have been charged with only 58.5%, or $2,900,262.69, of the Administrative and Other General Expenses, leaving a profit of $1,166,954.31, *i. e.*, a sum almost identical with respondents' 1949 figure of $1,173,168 which, as we have shown, *supra*, p. 6), contains some administrative expenses.

3. Respondents likewise claim that a deficit of the business activities in the amount of $3,250,450 is expected for the fiscal year ending June 30, 1958. The fact is that, if the figures are properly computed, the business activities presumably will break even. In any event, the loss of operating income and the increase of administrative expenses is not petitioner's fault, but is the direct consequence of congressional action.

As already noted, petitioner's business activities fall into two groups, the "allied maritime operations" and the "supporting operations".[10] The 1958 budget estimates the income from the former activities at $1,131,500,[11] which is $400,000 less than in 1954.[12] The decrease in operating income of the supporting service operations is far more serious. That figure has

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[9] H. Doc. 210, 85th Cong., 1st Sess., p. 18, note c.

[10] R. 179, Reply Brief, p. 13; Respondents' Rebuttal Brief, p. 4, footnote.

[11] H. Doc. 16, 85th Cong., 1st Sess., p. 618, Schedule B–1.

[12] Cf. Reply Brief, p. 13.

shrunk from $2,549,197 in 1954 (Reply Brief, p. 13) and $2,389,987 in 1956 [13] to an estimate of $886,800 in 1958.[14] The reasons for this change, however, are beyond petitioner's control.

One of them is the $531,600 deficit of the Panama Railroad [15] which petitioner seeks to abandon but is compelled to continue in operation by virtue of a congressional directive.[16] In addition, Art. XII of the 1955 Treaty with Panama (6 U. S. T. 2273, 2288–89), which limits the right to make purchases in the commissary stores to United States citizens and persons actually residing in the Canal Zone, has cut the gross receipt of the commissaries from nearly $26,000,000 in 1956 to an expected $13,760,000 in 1958 (*i. e.*, nearly in half), and has reduced their operating profit by $579,000 from $779,106 in 1956 to an expected $200,000 in 1958.[17] For similar reasons, the profit of the "supply operations" has shrunk by nearly $250,000.[18] But for these congressional and treaty requirements the operating income of the supporting service operations would amount to approximately $2,300,000, *i. e.*, not much less than the 1954 figure [19] which, as we have seen, compares favorably with the one for 1949.

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[13] H. Doc. 16, 85th Cong., 1st Sess., p. 619, Schedule B–2.

[14] *Ibid.*

[15] *Ibid.*

[16] Petitioner's Main Brief, p. 53.

[17] H. Doc. 16, 85th Cong., 1st Sess., p. 619, Schedule B–2. See also the pertinent comments in the Audit Report of the Comptroller General for 1956, H. Doc. 210, 85th Cong., 1st Sess., pp. 13–14.

[18] *Ibid.*

[19] *Supra*, p. 7; Reply Brief, p. 13; R. 179.

Respondents now claim that the operating profit of the Allied Maritime Operations ($1,131,500) and of the Supporting Service Operations ($886,800), totalling $2,018,300, should be charged with 75% of the General Corporate Charges or Administrative Expenses (an item which they say amounts to $7,015,000), and thus they compute a deficit of $3,250,450. Respondents' figure of $7,015,000 has been taken from a schedule entitled "Statement of Sources and Application of Funds".[20] According to petitioner's "Consolidated Statement of Income and Expense", the item "Other General Corporate Charges", after direct assessment of assignable charges, amounts to $6,163,400, *i. e.*, nearly $1,000,000 less than respondents' figures.[21]

Furthermore, we have shown (*supra*, pp. 7–8) that the supporting business operations for 1956 cannot be charged properly with 75% of the administrative expenses. The Comptroller General's Audit Report for 1956 pointed out that 58.5% was the correct figure for the fiscal years from 1952–1956. Even that ratio, however, is no longer accurate in view of the notable reduction in the scope of the supporting service activities. In 1956, their gross income amounted to

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[20] H. Doc. 16, 85th Cong., 1st Sess., p. 615.

[21] H. Doc. 16, 85th Cong., 1st Sess., p. 616. This figure is only slightly higher than the $5,843,319 actually incurred in 1956. It is about $1,200,000 in excess of the 1954 figure (R. 179). This increase has been caused by the general rise in costs and, in part, by the obligations incurred under the Treaty with Panama, cf. Comptroller General's Audit Reports for 1954, 1955 and 1956. H. Doc. 160, 84th Cong., 1st Sess., pp. 21–23; H. Doc. 465, 84th Cong., 2d Sess., p. 14; H. Doc. 210, 85th Cong., 2d Sess., p. 18.

$41,629,185, *i. e.*, a little more than that of the Canal operations. The 1958 estimate of the gross income of the service operations has been reduced to $28,763,400, while that of the Canal has risen slightly.[22] This shrinkage in the role of the service activities requires a recomputation of the percentage of the administrative expenses allocable to the supporting business activities. It is probable that this recomputation will result in so substantial a reduction of the 58.5% figure used by the Comptroller General in 1956 that the supporting business activities will not show a loss for 1958.[23]

Respectfully submitted,

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APRIL 1958.

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[22] H. Doc. 16, 85th Cong., 1st Sess., pp. 618–619, Schedules B–1 and B–2.

[23] We wish to stress that we have made the computations in Part II of this memorandum merely in order to show that, if respondents' view that allocation is required is accepted, the supporting business activities do not show a loss after general corporate expenses. This, however, is not to be regarded as a concession that petitioner has the duty of making such an allocation of its corporate overhead (cf. Main Brief, pp. 80–82).

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In the Supreme Court of the United States

OCTOBER TERM, 1957

PANAMA CANAL COMPANY, PETITIONER

v.

GRACE LINE, INC., ET AL.

GRACE LINE, INC., ET AL., CROSS-PETITIONERS

v.

PANAMA CANAL COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE PANAMA CANAL COMPANY IN OPPOSITION TO THE APPLICATION OF GRACE LINE, INC., ET AL., FOR AMENDMENT OF OPINION

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The Panama Canal Company opposes the application of Grace Line, Inc., et al., for amendment of the opinion rendered on April 28, 1958, in these cases. 356 U. S. 309. We submit that the Court's opinion fairly describes the issues raised by the proceedings.

I

The first part of respondents' application objects to those parts of the opinion which state that this litigation involves questions of accountancy and cost allocation, in addition to bare questions of statutory interpretation. These objections, although not new,[1] are curious in view of respondents' own briefs on the merits. Their Main Brief, Part One, Point III (pp. 53–68),[2] is largely devoted to accounting problems, some of those matters being as complicated as write-ups of the capital account, and reductions of accumulated depreciation (pp. 61–62, 65). Our briefs, too, discuss in detail the questions of accountancy, allocation and pricing which underlie this litigation; and they explain the close and direct bearing which the problems of cost-allocation have upon the issues of statutory interpretation.[3] And the Comptroller General has plainly recognized, contrary to respondents' statements, that the petitioner has views on cost-allocation and has made such allocations; see, *e. g.*, his report for 1956, H. Doc. 210, 85th Cong., 1st Sess., p. 16, referring to "the Company's views on allocation of general corporate expense". Respondents cannot deny that this litigation involves disputes over petitioner's accounting and allocation practices simply because they choose to label those practices as "ambiguous

[1] The brief in opposition of Grace Line, Inc., et al., to the petition for certiorari in No. 251 contains similar statements (cf. pp. 2–3).

[2] See also pp. 52–53, dealing with questions of rate fixing and cost allocation. Respondents' rebuttal brief deals with accounting problems at pp. 3–4.

[3] Cf. our Main Brief, pp. 80–84; Reply Brief, pp. 10–20.

bookkeeping." One man's accounting and allocation methods frequently appear to another man as "ambiguous bookkeeping."

II

Respondents' second objection to the opinion centers around the statement (356 U. S. at 312) that "[i]t was learned that if the Canal were operated at cost, the tolls would have to be raised to a prohibitive level. Congress therefore undertook to reduce the financial burden that was imposed upon the users of the Canal". But the fact remains that if the tolls were required to earn the full cost of operating the Canal, including the interest charges as they existed in 1950 and the free transit of Government vessels, they would have to be close to $1.40 per net vessel ton.[4] Congress therefore reduced the financial burden of the Canal—thus reducing the cost to be recovered by tolls and making possible the establishment of toll rates at levels then expected to be in the neighborhood of $.95 to $1.00. This was done by lowering the interest charges, abolishing the free transit of Government vessels, and providing that the profit of the supporting activities (if any) should be used to pay a part of the cost of the Canal Zone Government.[5]

Respondents also object to this passage in the opinion on the ground that it "seems to imply that re-

[4] Senator Knowland pointed out that this toll rate would "completely dry up any coastwise traffic through the Canal". *Miscellaneous Bills*, Hearing before the Committee on Armed Services, United States Senate, 81st Cong., 2d Sess., on S. 2222, etc., September 7, 1950, p. 18.

[5] Petitioner's Main Brief, pp. 14-17, 86-88; Petitioner's Reply Brief, pp. 4-6.

spondents are trying to get tolls fixed at less than cost" (Application, p. 5). If that implication exists, we do not believe that respondents have any reason to complain of it. Under the Comptroller General's own evaluation of the problem, respondents are seeking to have the tolls fixed under a formula which will not reflect true costs. As we have shown in our Main Brief (pp. 19–20) and in our Reply Brief (pp. 7, 17), the Comptroller General insists that a deficit in the operation of the supporting activities constitutes a legitimate element of the cost of maintaining and operating the Canal, and that the failure to recover it through tolls would constitute a subsidy to the Canal users at the expense of the American taxpayer.[6]

III

Respondents likewise ask for the elimination of the words "at least" from the sentence, "It is at least arguable that Congress to date has sided with petitioner and against the Comptroller General in construing §§ 411 and 412 of the Code" (356 U. S. at 319). In substance, respondents seek by this device to attack the point that Congress has ratified petitioner's action by the passage of three appropriation acts after having been advised of this dispute.[7]

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[6] We pointed out in our petition for a writ of certiorari in No. 251 (p. 37, fn. 70) that, during congressional hearings, one of respondents' spokesmen had to concede that the Comptroller General did not consider respondents' position morally correct.

[7] We may note, initially, how belated is this portion of respondents' application. Petitioner made its argument as to Congressional ratification in its Main Brief (pp. 136–138), and on oral argument, and respondents had ample opportunity to answer it in their Main Brief, as well as in their Rebuttal Brief.

The claim seems, first, to be that the congressional action on petitioner's budget pursuant to Section 104 of the Government Corporation Control Act (31 U. S. C. 849) does not constitute an "approval" because the appropriation legislation does not use that specific language. The budget programs of Government corporations, however, are submitted to Congress as part of the annual budget (Government Corporation Control Act, Section 103, 31 U. S. C. 848); Congress acts upon them in appropriation acts (Petitioner's Main Brief, pp. 22, 137); and it utilizes the procedures of the Government Corporation Control Act to exercise detailed control over petitioner's operations (Petitioner's Main Brief, p. 53). Indeed, as this Court has pointed out recently, the Government Corporation Control Act "provides such close budgetary, auditing and fiscal controls that little more than corporate name remains to distinguish it [the Government corporation] from the ordinary government agency" (*Rainwater* v. *United States*, October Term, 1957, No. 276, decided May 26, 1958, slip opinion, p. 2). In these circumstances, we submit that the legislative action under Section 104 of the Government Corporation Control Act is fully equivalent to ordinary appropriations, which have frequently been held to be ratification of executive or administrative action.

Respondents' second argument, based on S. Rept. 2375, 84th Cong., 2d Sess., is that Congress clearly adopted an attitude of "studied neutrality". S. Rept. 2375, however, did not relate to an appropriation act but to legislation which never even reached the floor of the Senate. The other legislative expressions re-

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Respondents.

No. 252.

GRACE LINE, INC., ISBRANDTSEN COMPANY, INC., LUCKENBACH STEAMSHIP COMPANY, INC., MATSON NAVIGATION COMPANY, MOORE-McCORMACK LINES, INC., ORE NAVIGATION CORPORATION, CALMAR STEAMSHIP CORPORATION, POPE AND TALBOT, INC., STATES MARINE CORPORATION OF DELAWARE, UNITED FRUIT COMPANY, UNITED STATES LINES COMPANY, WEYERHAEUSER STEAMSHIP COMPANY *et al.*,

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v.

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Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 251.

PANAMA CANAL COMPANY,

Petitioner,

v.

GRACE LINE, INC., ISBRANDTSEN COMPANY, INC., LUCKENBACH STEAMSHIP COMPANY, INC., MATSON NAVIGATION COMPANY, MOORE-McCORMACK LINES, INC., ORE NAVIGATION CORPORATION, CALMAR STEAMSHIP CORPORATION, POPE AND TALBOT, INC., STATES MARINE CORPORATION OF DELAWARE, UNITED FRUIT COMPANY, UNITED STATES LINES COMPANY, WEYERHAEUSER STEAMSHIP COMPANY *et al.*,

Respondents.

No. 252.

GRACE LINE, INC., ISBRANDTSEN COMPANY, INC., LUCKENBACH STEAMSHIP COMPANY, INC., MATSON NAVIGATION COMPANY, MOORE-McCORMACK LINES, INC., ORE NAVIGATION CORPORATION, CALMAR STEAMSHIP CORPORATION, POPE AND TALBOT, INC., STATES MARINE CORPORATION OF DELAWARE, UNITED FRUIT COMPANY, UNITED STATES LINES COMPANY, WEYERHAEUSER STEAMSHIP COMPANY *et al.*,

Petitioners,

v.

PANAMA CANAL COMPANY,

Respondent.

BRIEF FOR GRACE LINE *et al.*

The case is here on writs of certiorari to the United States Court of Appeals for the Second Circuit.

The respondents, cross-petitioners Grace Line, Inc. *et al.* on whose behalf this brief is filed, will hereinafter be referred to as "plaintiffs." The petitioner, cross-respondent Panama Canal Company, will hereinafter be referred to as "defendant."

Emphasis has been added except where otherwise noted.

Questions Presented.

The primary questions are numbered; the incidental and subsidiary questions on which the answers to the primary questions depend follow them.

1. Did defendant unlawfully withhold and unreasonably delay the prescription of reduced tolls?

   (a) Do Sections 411 and 412, Title 2, of the Canal Zone Code, as amended by the Act of September 26, 1950, require that tolls be prescribed on the basis of Canal operations only and without regard to the losses of defendant's collateral activities, activities which serve the Armed Forces, the Republic of Panama and the public as well as the Canal?

   (b) Does the Hay-Pauncefote Treaty require that tolls be prescribed on the basis of Canal operations only?

   (c) Do the Canal's operating results call for the prescription of reduced tolls?

   (d) Did the duty to prescribe tolls in accordance with Sections 411 and 412 take effect upon the transfer of the Canal to defendant, or, does it take effect at defendant's pleasure?

2. The defendant having unlawfully withheld and unreasonably delayed the prescription of reduced tolls, did the

District Court have jurisdiction to grant a mandatory injunction to require such prescription?

(a) Did the District Court have jurisdiction over plaintiffs' claim under 28 U. S. C. §1331?

(b) May plaintiffs' claim be enforced against defendant in its capacities (1) as a corporation subject to suit and (2) as an agency of the United States, under case law and the Administrative Procedure Act?

(c) Do statutes preclude judicial scrutiny of defendant's unlawful failure to act?

(d) Does the review power of the President mean that he should "take Care" that Section 412 be "faithfully executed" by defendant in prescribing tolls, and, if so, is the premise false upon which defendant invokes the doctrine of *Chicago & Southern Airlines* v. *Waterman SS. Corp.*, 333 U. S. 103, in its argument that the District Court lacked jurisdiction?

(e) Did the District Court have jurisdiction whatever the review power of the President may be interpreted to mean?

(f) May a District Court other than the District Court for the District of Columbia grant a mandatory injunction against a government corporation fully subject to suit?

(g) Are miscellaneous excuses offered by defendant valid?

(h) Do the plaintiffs have standing to sue under general principles of law, the Administrative Procedure Act and the Hay-Pauncefote Treaty?

(i) Did the Court of Appeals properly direct the entry of summary judgment?

(j) If and to the extent that an order of the President embodies an error of law, is it subject to judicial review?

3. Is defendant liable to plaintiffs and their class for the damages caused by its unlawful and unreasonable failure to act?

(a) Is there an adequate basis for the calculation of damages?

(b) Did Congress intend that defendant be liable for overcharges?

Statement of the Case.

The Complaint.

The action was brought by twelve U. S. flag shipping companies as a class action under Rule 23 (a) (3), on behalf of all users of the Panama Canal. Subsequently a number of other U. S. flag shipping companies intervened (R. 1-9).

Plaintiff sought (1) to compel defendant to prescribe tolls on the basis of Canal operations only, and without regard to the losses of the "business" or "collateral activities," as required by Section 412, Title 2, of the Canal Zone Code as amended by the Act of September 26, 1950 (Public Law 841, 81st Cong., 2d Sess.), and (2) to recover damages for its past failure to do so (R. 8-9).

Plaintiffs' grievance against defendant is in substance this: that on July 1, 1951 it became defendant's duty to prescribe tolls according to a formula defined by law; that in essence this formula provided that tolls should cover only the interest on the capital invested in the Canal and costs of operation; that it wholly failed and neglected to

prescribe tolls accordingly; that it "concealed" by "ambiguous bookkeeping"* the facts which would have made its failure known to plaintiffs and the public; that meanwhile, according to the computations of the Government's own accountants, the General Accounting Office, defendant has been and is collecting tolls in excess of the lawful formula at the rate of approximately $25,000 a day, of which about $4,000 a day has been and is being paid by the twelve original plaintiffs; that, as found by GAO, the excess collections for the first three years to June 30, 1954 were $27,836,504; and that the excess collections have since continued at at least the same rate.

The Theory of the Complaint.

The theory of the complaint is that:

(1) The right to grant mandatory relief and damages is rested on general principles of law and Section 10 of the Administrative Procedure Act. Case law and the Administrative Procedure Act authorize "any court of competent jurisdiction" to compel corporation and also "agency action unlawfully withheld or unreasonably delayed" in "any applicable form of legal action (including actions for declaratory judgment or writs of prohibitory or mandatory injunction)." Case law also establishes the authority of the courts to award damages suffered by reason of breach of statutory duty.

(2) Defendant's liability to suit is declared by Section 248, Title 2, of the Canal Zone Code as enacted by the Act of June 29, 1948, creating defendant and providing that defendant

"(d) May sue and be sued in its corporate name."

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* Quoted from the Court of Appeals (R. 249).

Section 245, also so enacted, provides that:

> "Within the meaning of the laws of the United States relating to venue in civil actions, the corporation shall be deemed to be an inhabitant and resident both of the southern judicial district of New York and the Canal Zone."

(3) Jurisdiction exists under Section 1331, Title 28, of the United States Code vesting in the district courts jurisdiction of cases arising "under the Constitution, laws or treaties of the United States."

(4) Defendant's duty to prescribe tolls is defined by Section 412. Authority to do so is granted by Section 411. These Sections are discussed at length *infra* pp. 79-84.

(5) The rate has been excessive to the extent of 25% or about $25,000 a day as shown by the General Accounting Office audit report for 1954. Of particular relevance is the table appearing at p. 13 of that report (R. 32) and reproduced at p. 55 of this brief showing defendant's operating results from July 1, 1951 to June 30, 1954 broken down as between Canal operation and the collateral activities.

The Proceedings.

The complaint was filed September 13, 1955 (R. 1).

On October 28, 1955 Judge Edelstein granted an order to show cause why summary judgment should not be granted in plaintiffs' favor (R. 10-12). Plaintiffs also commenced discovery proceedings chiefly to secure a copy of an opinion by defendant's General Counsel reported to support plaintiffs' position (R. 1-2). Cf. *infra* pp. 42-43.

On December 16, 1955 defendant served a notice of a motion to dismiss the complaint under Rules 12(b)(1) and (7) of the Rules of Civil Procedure (R. 185).

On December 19, 1955 Judge Walsh granted an order to show cause, returnable the following morning, why plaintiffs' discovery proceedings should not be stayed until after the decision on defendant's motion to dismiss (R. 209). In the argument in this brief the expression the "District Judge" refers to Judge Walsh.*

Judge Walsh made a temporary order staying the discovery proceedings on December 22, 1955 and continued it on January 4, 1956 (R. 209-210; 212-213).

Defendant's motion to dismiss was argued before Judge Walsh December 29, 1955 (R. 206, 211).

By an order filed on June 29, 1956 Judge Walsh sustained the motion and dismissed the complaint (R. 234).

Plaintiffs took an appeal on July 26, 1956 to the United States Court of Appeals for the Second Circuit (R. 3).

The appeal was argued on November 13 and 14, 1956 (R. 235).

On April 8, 1957 the Court of Appeals reversed the District Court and directed the entry of summary judgment requiring defendant to prescribe tolls without regard to the losses of the collateral activities. The Court held plaintiffs not entitled to relief for past damages (R. 235-237).

On May 1, 1957 the Court of Appeals denied defendant's application for a stay pending its petition to this Court for certiorari (R. 259).

On May 7, 1957 Mr. Justice Harlan granted such a stay (R. 262).

Both parties filed petitions for certiorari on July 6, 1957.

This Court granted writs of certiorari on October 14, 1957.

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* In late 1957 Judge Walsh resigned to become Deputy Attorney-General of the United States.

Facts.

Events prior to the transfer of the Canal July 1, 1951.

The following statement of facts is intended to give a brief general picture. More detailed statements of fact relevant to particular controversial issues will be made in various points argued.

The Panama Canal has a long history. As far back as 1551 the Spanish historian de Gomara demanded of Philip II that he build a canal at Panama "without delay."

The events relevant to this litigation may be said to have begun shortly after 1848, the year in which the Mexican cession, effected by the Treaty of Guadalupe Hidalgo, and the discovery of gold at Sutter's Fort enormously stimulated interest in California and in ways of getting there.

The organization of the Panama Railroad Company. On April 7, 1849 the New York Legislature created a corporation called the "Panama Railroad Company" (Ch. 284, Laws of 1849).

As defendant's name prior to July 1, 1951 was also "Panama Railroad Company" we shall in the interest of clarity refer to this corporation created in 1849 as "Panama Railroad Company (the New York company)."

The Panama Railroad Company (the New York company) was organized by New York businessmen to build a railroad across the Isthmus of Panama. The railroad was completed in 1855.

The Clayton-Bulwer Treaty; canal rates to be "just and equitable." On April 19, 1850 the Governments of the United States and Great Britain concluded the Clayton-Bulwer Treaty. Canal Zone Code, p. 833. By this Treaty

each Government undertook (Article I, pp. 833-834) not "to obtain or maintain for itself any exclusive control over the said ship canal," referring to a ship canal between the Atlantic and Pacific Oceans through Central America, and not to fortify either the canal or any part of Central America. The Governments (Article V, p. 835) further agreed to protect any private canal or railway enterprise on condition that it impose (Article VIII, p. 836) no "charges or other conditions of traffic thereupon than the aforesaid Governments shall approve of as just and equitable."

The French. In the 1880's French interests commenced an attempt to dig a canal at Panama. In connection with this enterprise the French acquired 68,888 of the 70,000 shares of the Panama Railroad Company (the New York company). The French effort had definitely failed by the early 1890's, but the French continued to own and operate the Panama Railroad Company (the New York company).

The United States repeatedly declares its policy that an interoceanic canal should be for the benefit of world commerce at reasonable tolls, and not for the selfish advantage of any nation. During the 19th century the question of an interoceanic canal across Central America was often agitated. In 1826 Secretary of State Henry Clay said in his instructions to the delegates to the Panama Congress (IV, *Proceedings of International American Conference*, 144):

> "[If a canal across the Isthmus be opened] so as to admit of the passage of sea vessels from ocean to ocean, the benef[it] of it ought not to be exclusively appropriated to any one nation, but should be extended to all parts of the globe upon the payment of a just compensation for reasonable tolls."

Declarations to the same general effect were made by Secretary of State Lewis Cass in a message to Great Britain

in 1857,[1] by Secretary of State James G. Blaine in instructions to Minister James Russell Lowell in 1881,[2] and by President Cleveland in his annual message of 1885.[3] The concept had, of course, also been embodied in Article VIII of the Clayton-Bulwer Treaty.

The Hay-Pauncefote Treaty; canal rates to be "just and equitable." The Spanish-American War persuaded American public opinion that the need for an interoceanic canal was urgent for national defense quite apart from commercial benefit. The Clayton-Bulwer Treaty stood in the way of a purely American enterprise. This difficulty was removed by the negotiation of the Hay-Pauncefote Treaty, concluded November 18, 1901. 32 Stat. 1903. The Hay-Pauncefote Treaty superseded the Clayton-Bulwer Treaty (Article I) and authorized the construction and control of a canal by the United States Government (Article II).

Article III of the Treaty provided as follows:

> "The United States adopts, as the basis of the neutralization of such ship canal, the following Rules, substantially as embodied in the Convention of Constantinople, signed the 28th October, 1888, for the free navigation of the Suez Canal, that is to say:
>
> "1. The canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality, so that

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[1] Quoted at 46 Cong Rec. 1821 ("The United States, as I have before had occasion to assure your Lordship [Palmerston], demand no exclusive privileges . . .").

[2] *Foreign Relations of the United States—1881,* pp. 537-538 ("The United States [does not] seek any exclusive privileges . . .").

[3] 3 Moore, *International Law Digest,* 199 (". . . the wisdom and foresight of those earlier administrations . . . consecrated [an interoceanic canal] in advance to the common use of mankind by their positive declarations and through the formal obligations of treaties").

> there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable."

The anti-discrimination provision and the remaining rules of Article III were drawn from the Constantinople Convention of 1888. The requirement that "conditions and charges of traffic shall be just and equitable" was inserted at the request of Lord Lansdowne, the British Foreign Minister. The similarity in phraseology indicates that he took these words from Article VIII of the Clayton-Bulwer Treaty.*. There is no similar provision in the Constantinople Convention.† The only tolls limitation applicable to the Suez Canal Company was provided by Article XVII, 3d of the concession granted on January 5, 1856 to Ferdinand de Lesseps by Khedive Mohammed Said.

The United States acquires the Canal Zone and the Panama Railroad Company (the New York company) and builds the Canal on a "mandate from civilization." The Act of June 28, 1902 (32 Stat. 481) provided for the construction of the Panama Canal by the United States Government. *Inter alia* this Act authorized the President to buy

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* According to the State Department's history of the negotiations (Document No. 746, 61st Cong. 3d Sess. 9):

> "One other amendment proposed by Lord Lansdowne was regarded by the President as so entirely reasonable that it was agreed to without discussion. This was the insertion at the end of clause 1 of Article III of the words, 'Such conditions and charges of traffic shall be just and equitable.' . . ."

† The Constantinople Convention was actually negotiated by an *ad hoc* international commission which met in Paris March 30-June 13, 1885. The British representative on this commission was Sir Julian Pauncefote, who later as Lord Pauncefote and British Ambassador to the United States, signed the Treaty that bears his name. Hallberg, *Suez Canal*, 286-287.

out the French for $40,000,000. In order to get access to the Isthmus of Panama it was necessary, however, to obtain the permission of the sovereign of that territory, at that time the Republic of Colombia. Colombia insisted upon terms which the United States regarded as extortionate and an impasse was reached.

At this point, on November 3, 1903, the inhabitants of the Isthmus revolted, asserted their independence and organized the Republic of Panama. On November 18, 1903 the United States concluded a treaty with Panama, the Hay-Bunau Varilla Treaty (33 Stat. 2234). By this Treaty Panama ceded a Zone to the United States for the construction of a canal.

In answer to criticism that the United States was unduly sympathetic to the Panamanian revolt President Roosevelt asserted that we had gone into the Isthmus by virtue of a "mandate from civilization."*

That the United States was obligated by Treaty to serve ships of all nations at reasonable tolls dispelled the cynicism with which the world might otherwise have received President Roosevelt's statement.

Several years later Senator Elihu Root had occasion to describe the responsibilities of the United States respecting the Canal in a speech on the floor of the Senate on January 21, 1913. The occasion was the controversy over tolls on coastwise traffic to which reference is made *infra* p. 83. Congress later adopted the measure which Senator Root advocated in this speech, the Act of June 15, 1914, *infra* p. 83; Appendix B, 11a. Referring to the statements by President Roosevelt and earlier statesmen, he said (46 Cong. Rec. 1822):

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* 3 Moore, *International Law Digest*, 75 (special message of January 4, 1904).

"We base our title upon the right of mankind in the Isthmus, treaty or no treaty. We have long asserted, beginning with Secretary Cass, that the nations of Central America had no right to debar the world from its right of passage across the Isthmus. Upon that view, in the words which I have quoted from President Roosevelt's message to Congress, we base the justice of our entire action upon the Isthmus which resulted in our having the Canal Zone. We could not have taken it for our selfish interest; we could not have taken it for the purpose of securing an advantage to the people of the United States over the other peoples of the world; *it was only because civilization had its rights to passage across the Isthmus and because we made ourselves the mandatory of civilization to assert those rights that we are entitled to be there at all.*"

In 1904 President Roosevelt acquired from the French their assets and properties in the Isthmus of Panama, including the 68,888 shares in the Panama Railroad Company (the New York company). In 1905 the Government acquired the remaining 1,112 shares.

Between 1904 and 1914 the United States built the Canal through an agency known as the "Isthmian Commission."

The administration of the Zone, the Canal and the Panama Railroad Company (the New York company) from 1912 to 1951. When the Canal was approaching completion Congress adopted the Act of August 24, 1912, the "Panama Canal Act" (37 Stat. 560). This Act provided for the operation of the Canal and the administration of the Zone by a "Governor" appointed by the President. This agency was never incorporated and was known as "The Panama Canal" or the "unincorporated agency".

The Canal Zone was heavily fortified. Large units of the Armed Forces were stationed there, not only for the

protection of the Canal, but also for training, particularly jungle training. These units and their dependents came to constitute more than half the population of the Zone.

The Panama Railroad Company (the New York company) continued to operate its railroad; in the course of years, and in connection with French canal construction and American construction and operation and the needs of the Armed Forces, the Republic of Panama and the public, it acquired a steamship line, docks, coaling plants, commissaries, dry and cold storage plants, hotels and various other properties.

The activities of the Panama Railroad Company (the New York company) were commonly called the "business activities" to distinguish them from Canal Zone administration and Canal operation by the Governor of The Panama Canal. These activities were also called the "collateral activities"; the two expressions are used interchangeably in this brief.

The Panama Railroad Company (the New York company) was always subject to suit in connection with its activities; in fact it was a most active litigant; cf. *infra* p. 90.

The Panama Railroad Company (the New York company) becomes a United States corporation fully subject to suit (Act of June 29, 1948). In 1945 Congress adopted the Government Corporation Control Act, 59 Stat. 597, 602; 31 U. S. C. §841-871. That Act (31 U. S. C. §869) forbade the continuance, after June 30, 1948, of any "wholly owned Government corporation created by or under the laws of any State, Territory, or possession of the United States." It therefore became necessary to reorganize the Panama Railroad Company (the New York company) before June 30, 1948. This reorganization was effected by the Act of June 29, 1948 (Public Law 808, 80th Cong., 2d Sess.) 62 Stat. 1075.

This statute created defendant by appropriate amendments to the Canal Zone Code. As noted *supra* p. 5 the Act provided that defendant should be subject to suit. Other provisions of the Act of June 29, 1948 will be noted where relevant in the argument *infra*.

Defendant appears to have carried on its activities without material change from the ways of its predecessor, the New York company of the same name.

During its entire history, up to July 1, 1951, defendant and its predecessor Panama Railroad Company (the New York company) operated the business activities most profitably, and paid large sums in dividends to the United States Treasury, cf. *infra* pp. 65-66.

Under the Act of 1912 the President was "authorized" to prescribe tolls within limits specified by Congress. The tolls statutes prior to the Act of September 26, 1950 are collected in Appendix B, 10a-13a. The last preceding statute was the Act of August 24, 1937, 50 Stat. 750, authorizing tolls per laden ton not to "exceed $1, nor be less than $0.75" (Appendix B, 13a). Pursuant to this Act President Franklin D. Roosevelt had fixed tolls at a rate of 90¢ on August 25, 1937. Federal Register, Year 1937, Volume 2, Part 2, pp. 1764. This rate was in effect in 1948, the year in which began the agitation which led to the enactment of the Act of September 26, 1950.

Congress adopts the Act of September 26, 1950 in order to establish a tolls policy which would allocate against tolls only a fair share of Canal and Canal Zone expense, and properly charge to the Government the costs of national defense. The interpretation of the Act of September 26, 1950 presents major questions in the case. Here we shall state its enactments and briefly outline its history. The various steps in its history will be stated more fully *infra* in connection with the points to which they are relevant.

In March, 1948 the House Appropriations Committee recommended and the President announced an increase in toll rates from 90¢ to $1.00 per laden ton (Appendix I, 42a).

The shipping industry immediately protested. A primary ground of such protest was that tolls were based on costs that should be allocated to national defense. *Infra* pp. 34-35.

On February 28, 1949 the House of Representatives adopted Resolution 44, declaring tolls policy to be the responsibility of Congress and authorizing the Committee on Merchant Marine and Fisheries to conduct a study *"with particular reference to the proper accounting and allocation of costs attributable to"* Canal transits, military activities, civil government and defendant's business operations. Appendix I, pp. 40a-41a; cf. *infra* pp. 35-36.

A subcommittee of the Merchant Marine Committee conducted numerous hearings at which representatives of the shipping industry elaborated their arguments that tolls were charged excessively and made proposals for relief. Cf. Appendix I, pp. 47a-49a.

Because defendant's operations did not affect tolls, in these arguments the shipping industry representatives made no reference to them.

On August 23, 1949 the Merchant Marine Committee reported that it was impossible to fix tolls properly without business type accounts and recommended that the President cause a study to be made of the "organizational aspects of all phases of the Panama Canal." Cf. Appendix I, pp. 43a-44a.

The Bureau of the Budget then made a study which the President submitted to Congress on January 31, 1950. A bill, H.R. 8677, was introduced on May 25, 1950 to carry out its recommendations. After further hearings the bill was adopted and signed by the President on September 26,

1950. The Bureau study and the further hearings are analyzed in detail *infra* pp. 36-40, 69-74.

Principally, the Act:

1. Authorized the President to transfer the Canal (the waterway) to the defendant (Section 10).[1]

2. Renamed the defendant "Panama Canal Company" (Section 5).[2]

3. Left with "The Panama Canal," the unincorporated agency, its governmental functions, and renamed it the "Canal Zone Government" (Section 1).[3]

4. Authorized defendant to fix tolls subject to the approval of the President (Section 11).[4]

5. Directed that tolls be fixed so as to cover the expenses, including interest, of the Canal activity only, and a share of the cost of Canal Zone Government (Section 12).[5]

6. Incorporated Article III, Section 1 of the Hay-Pauncefote Treaty in "bases of tolls" (Section 12).[6]

7. Provided that the Act itself should become "effective" as of the day upon which the President transferred the Canal (Section 14).[7]

Pursuant to the Act the President transferred the Canal to defendant effective July 1, 1951 by Executive Order 10263 (16 F.R. 6333).

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[1] Appendix A, 5a.

[2] Appendix A, 4a-5a.

[3] Appendix A, 4a.

[4] Appendix A, 5a-6a.

[5] Appendix A, 6a-7a.

[6] Appendix A, 7a.

[7] Appendix A, 8a.

Events subsequent to July 1, 1951.

Defendant's custodianship of the Canal since July 1, 1951 has been marked by a sharp increase in traffic and large revenues, primarily from foreign shipping, a failure to obey the statutory command to prescribe tolls, and "ambiguous bookkeeping," in the language of the Court of Appeals (R. 249), referring to financial and accounting omissions, inconsistencies and irregularities described *infra* pp. 60-67.

The increase in tolls is illustrated by comparative figures for the year 1947, after which the Governor recommended an increased rate, the year 1952, the first year of operation of the Canal by defendant, and the years 1956 and 1957. (We supply 1956 figures because defendant's report for 1957 for the first time does not break down tolls between United States and foreign.[4])

	United States Government[1]	United States Private	Foreign	Total[1]
1947[2]	$2,305,787	$ 9,098,339	$ 8,498,363	$19,902,389
1952[3]	3,413,728	9,983,307	17,012,464	30,409,499
1956[3]	1,231,866	10,808,921	25,410,164	37,432,951
1957[4]	1,140,116	not available		39,653,520

[1] Government transits are not paid for, but are recorded at prevailing rates. Under Section 412(c) as enacted by the Act of September 26, 1950 the amounts are credited for tolls-fixing purposes.

[2] Report of the Governor of The Panama Canal for fiscal 1947, pp. 10, 38.

[3] Defendant's report for fiscal 1952, pp. 41, 56; and for fiscal 1956, pp. 47, 63.

[4] Defendant's report for 1957, p. 20.

Until 1957 defendant's reports and those of its predecessor, The Panama Canal, the unincorporated agency, were around 100 pages in length and despite significant omissions respecting the statutory tolls formula, contained many statistical tables and much information concerning operations.

The 1957 report is 28 pages long and contains relatively little information.

As defendant noted in its 1956 report at p. 5, its "operating costs . . . are largely composed of fixed charges which do not vary with business volume."

Anyone who has ever travelled on a toll highway or a toll bridge can appreciate that this statement by defendant is valid.

The direct operating expense of the Canal has indeed varied only slightly. It was as follows for the years referred to (including in all instances the expenses of other marine operations and maintenance and depreciation):

	Canal Direct Operating Expense
1947[1]	$14,369,029
1952[2]	15,286,156
1956[2]	16,138,275
1957	not available

[1] Report of the Governor of The Panama Canal for 1947, p. 131.
[2] Defendant's report for 1952, p. 42; for 1956, p. 47.

The enormous increase in Canal net operating income has been used for dividends ($15,000,000), the absorption of the losses of the "business activities," huge additional administrative expense, acquisition of fixed plant and the like, discussed *infra* pp. 55-57. However to a considerable extent defendant has "concealed" what has happened by "ambiguous bookkeeping," as the Court of Appeals put it (R. 249).

Due to the obscurity of defendant's financial statements the plaintiffs and the public did not know the results of Canal operations until the Comptroller General submitted to Congress on May 16, 1955 his audit report of defendant's affairs for fiscal 1954. It had, however, been apparent for some time that defendant was not applying the statutory

formula. The GAO report is discussed in greater detail, *infra* pp. 53-55.

The contrast with Suez. As noted by the Court of Appeals, the "most comparable waterway" is the Suez Canal. Footnote 33, R. 252. And the Hay-Pauncefote Treaty was substantially modeled on the Constantinople Convention of 1888.

At Suez the post-war increase in traffic has resulted in sharp reductions in rates.

At Suez in 1937, when the Panama rates presently in effect were originally fixed, the toll per laden ton was $1.4833 and $0.7416 per ballast ton. (The toll was officially stated in terms of Egyptian piasters; here we give the dollar equivalents.) At Suez the rate in 1948 was $1.6119 per laden ton; $0.8059 per ton in ballast. In 1950 the rates were reduced to $1.1201 and $0.56, respectively (by reason of devaluation of the Egyptian piaster); in 1951, to $1.0483 and $0.4882, respectively; and in 1954, to $0.975 and $0.444 respectively.

The 1954 reduction was announced on April 12, 1954, by a release saying in part:

> "During its 85 years of existence the Company has made 26 successive reductions in toll rates (with only 2 increases, both in war time, when traffic virtually disappeared).
>
> "The further (27th) reduction which becomes effective July 15 next will bring down the laden rate from 36.5 E.p. [Egyptian piasters] ($1.048) to 34 E.p. ($0.975) and the ballast rate from 17 E.p. ($0.488) to 15.5 E.p. ($0.444) per Suez net ton.
>
> "The new step down of Canal dues reflects the Company's traditional policy of sharing its prosperity with its clients. It is being made at a time when

shipowners are facing mounting costs and continually falling freight rates."*

[The sources of the foregoing statements are the release of April 12, 1954, the Company "fact sheet" of October 1, 1954 and correspondence with the Company.]

The Events that Congress did not Expect and Caused this Litigation.

Throughout this litigation defendant has always claimed that Congress anticipated that the formula would result in a 5¢ increase in the toll rate, e.g. Brief, 17.

Although there is some support for the claim that Congress expected the immediate result to be an increase of 5¢ a ton (R. 166-167), Congress foresaw that increased use of the Canal might require a reduced toll under the formula it was planning to adopt, *infra* pp. 73-74.

What Congress did not foresee was the reversal in the operating results of the business activities and the tactics thereupon adopted by defendant. Instead of earning their administrative expenses and a large profit, as they had for many years, for reasons that are not clear**, after July 1, 1951 the operating results of these activities became steadily worse until they failed to earn even their administrative expenses. *Infra* pp. 65-66. Contrary to law defendant then loaded these losses on the Canal activity, and as the Court of Appeals characterized it, "concealed" what it was doing by "ambiguous bookkeeping" (R. 249).

When the Comptroller General revealed what had happened plaintiffs brought this action to enforce the statutory tolls policy.

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* March, 1958 is also such a time.

** The GAO 1955 audit report suggested inefficient management and various other factors, pp. 34-36; cf. R. 240.

Summary of Argument.

The case presents three basic questions: First, has defendant unlawfully withheld and unreasonably delayed the prescription of reduced tolls? Second, did the District Court have jurisdiction to compel defendant to prescribe tolls by mandatory injunction? Third, are plaintiffs entitled to recover damages suffered by reason of defendant's unlawful and unreasonable failure to reduce tolls?

1. The unlawful withholding and the unreasonable delay. The central substantive issue in the case is whether or not defendant is entitled to charge the losses of the so-called "collateral activities" or "business activities" for tolls-fixing purposes under the formula provided by Section 412, Title 2 of the Canal Zone Code. Plaintiffs maintain that the statute does not permit that there be taken into account the losses of these activities which serve the Armed Forces, the Republic of Panama and the public as well as the Canal.

A study of defendant's books, made by the General Accounting Office in connection with its audit of defendant's affairs for the fiscal year ended June 30, 1954, showed that, disregarding these losses, defendant's toll collections were far in excess of the amount necessary to pay the defendant's costs lawfully considered in tolls-fixing.

For the three years ended June 30, 1954 the GAO showed Canal revenue of $112,861,870 as against all properly chargeable expense, apart from these losses, of $85,021,366, a difference of $27,836,504. In other words, tolls far lower would have produced the revenue required by the statute. Defendant had been collecting $25,000 a day more tolls than authorized by the statute. Defendant's subsequent reports show approximately the same, if not a greater rate of excess.

Hence, if the losses are not to be taken into account it is clear that defendant has long been charging in excess of the statutory rate.

A. *The losses of the collateral activities are not to be taken into account.*

(1) *The language of the statute.* Analysis of Section 412 shows that the losses of the collateral activities were not included in the formula. The phraseology of the Section 412 formula relates to the Canal only, and not to the business activities.

(2) *Legislative history.* As for legislative history, resolutions, testimony, studies and committee reports show a clear understanding by all concerned that the tolls were to service Canal costs only, and that the collateral activities were to bear their share of general expense, i.e., interest, administrative expense and cost of Canal Zone Government.

(3) *Defendant's admissions.* In its budget program for 1952 and elsewhere, and particularly by an opinion of its General Counsel given in 1953, defendant has admitted that the Canal activities and collateral activities were to be separately self-sufficient.

(4) *Defendant's "ambiguous bookkeeping"*: omissions, inconsistencies and irregularities.* In order to conceal its failure to comply with the formula, defendant's bookkeeping has been, in the language of the Court of Appeals, "ambiguous," and has been characterized by omissions, inconsistencies and irregularities. For instance, defendant has in recent years failed to show its results of operation on an activity basis; it has not complied with the

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* Quoting the Court of Appeals (R. 249).

requirement of the Government Corporation Control Act that its budget programs show expected results of operation by activities; it has paid large sums to the U. S. Treasury without lawful warrant; it has engaged in an unauthorized "valuation of assets"; it has written up its capital account by the reversal of entries going back forty years; and it has largely and inexplicably increased its administrative expense.

B. *To charge the losses of the business activities against tolls also violates the provision of the Hay-Pauncefote Treaty requiring that tolls be "just and equitable."* The reason is that the collateral activities serve the Army, the Navy, the Air Force, the Republic of Panama and the public generally. These activities only incidentally service the Canal. In substance, for the Canal to absorb these losses, means that the tollspayers are contributing to the expenses of the Armed Services, the Republic of Panama and those members of the public who use the services of the collateral activities. Congress, correctly applying the Hay-Pauncefote Treaty, has recognized that national defense costs are not a proper charge on tolls.

C. *Toll rate not a matter of defendant's pleasure.* The District Judge decided that defendant could keep a toll rate so long as it was "content" with it. The Court of Appeals disagreed.

Section 411 authorized defendant to prescribe tolls; Section 412 provided that tolls "shall be prescribed" according to the formula of that section; and Section 14 of the Act of 1950 made both Sections 411 and 412 "effective" as of the day the President transferred the Canal to defendant—viz., July 1, 1951.

"Shall" is "language of command." Hence it became defendant's duty to bring tolls in line with the formula on July 1, 1951.

Moreover, and this was emphasized by the Court of Appeals, the legislative history shows that Congress intended to adopt a new policy by which tolls would go up or down according to the operations of the formula—that is, as business increased or decreased, as costs went higher or lower, etc.

2. The District Court had jurisdiction to compel defendant to prescribe tolls by mandatory injunction. In general a district court may compel a corporation or Government agency to comply with a statutory duty. And defendant is as subject to suit as any corporation—not only is this true as a general principle of law but, in this instance, Congress by the Act of July 16, 1949, revised the Federal Tort Claims Act so that defendant would be subject to suit like "any private corporation."

To escape jurisdiction defendant has advanced the theory that the President's power to review defendant's tolls prescriptions has somehow changed the tolls-fixing process from administration of statutory policy by the executive branch into a matter of executive policy. The President has, we are in substance told, absolute discretion ("unlimited" according to the District Judge) in tolls-fixing, and tolls prescriptions by defendant pursuant to statute constitute mere possibly helpful items of information. Plaintiffs wholly disagree.

By Section 411 Congress provided for the administration of the tolls policy defined in Section 412. The function of the President was to "take Care" that defendant "faithfully" carried out that policy. Both the President and defendant in acting under Section 411 are bound by Section 412.

A. *Contrary to defendant's contention, statutes applicable to defendant not only fail to "preclude" judicial scrutiny of its disobedience of the statute, but positively invite it.*

B. *The premise on which defendant urges cases and arguments relating to matters of executive policy is false. The Section 411 proviso put upon the President a duty to enforce the Congressional tolls policy; it did not grant a privilege to disregard it.* This result is reached by all appropriate standards and guides, viz., the language of the statute, especially as that language has been judicially construed, the legislative history, the arrangement of the statute, the Hay-Pauncefote Treaty, the law of rate-making, and the respective constitutional functions of Congress and the President. The fallacy of defendant's argument is sharply indicated by its statement of the non-statutory factors it says the President may consider.

C. *Jurisdiction exists whatever the review power may mean.* Defendant's principal argument is that jurisdiction is lacking by reason of the President's review power provided in Section 411.

But whatever that review power may be, defendant may be compelled to prescribe tolls. The courts can require that corporations and Government agencies perform their statutory duties even if the result is not judicially reviewable or for any reason may never become effective, including statutory duties preliminary to action by the President.

D. *Miscellaneous reasons given by defendant for lack of jurisdiction, such as its alleged special competence to interpret statutes, the alleged necessity for construing the Act of 1950, and the allegedly unexpected result of the Act of 1950, are unfounded.*

E. *The district courts generally may grant mandatory relief.* Defendant argues that the only district court that may grant mandatory relief is the District Court for the District of Columbia. But a host of cases, particularly *Virginian Ry.* v. *System Federation,* 300 U. S. 515, and *Brown* v. *Board of Education,* 349 U. S. 294, establish that the other district courts also have that power.

F. *Plaintiffs have standing to sue.* Defendant also challenges plaintiffs' standing to sue, relying particularly on *Alabama Power Co.* v. *Ickes,* 302 U. S. 464, and *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113.

Plaintiffs reject this challenge. In private law those entitled to lawful rates have status to enforce that right by suit. Plaintiffs are so entitled under both the Hay-Pauncefote Treaty and the Act of 1950, whether defendant be considered as a Government corporation subject to suit or as an agency of the United States.

Of the cases cited by defendant, *Perkins* turns on the "unrestricted power" of "private individuals and businesses" to "fix the terms and conditions upon which they will make needed purchases." *Alabama Power* turns on the lack of status of a stranger to a loan to bring suit to enjoin the loan. The distinction between those cases and this is obvious.

Defendants intricate argument that this case does not come within Sec. 10(a) of the Administrative Procedure Act would turn that Section into a prohibition against judicial review in all cases in which such review was not explicitly provided. But the language and history of that Section show that, on the contrary, it was intended to provide for judicial review in all cases other than those in which such review was "precluded."

G. *The Court of Appeals acted properly in directing the entry of summary judgment for plaintiffs.*

H. *Although this question is not now before the Court, if the President should base the exercise of his review power upon an error of law, the courts would have power to correct it under the Administrative Procedure Act and applicable principles of law.* The courts may examine the lawfulness of the actions of the President; the words "final and conclusive" do not bar judicial review; and the President is not a necessary party defendant.

3. Damages. The Court of Appeals held against plaintiffs on the question of damages for the excessive tolls collected in the past for two reasons: because "there is no way of knowing whether or not the President would have approved" tolls fixed by defendant, and because it could "find no evidence of a congressional intent to allow recovery of overcharges" (R. 257). Defendant more or less adopts this reasoning.

A. *If the President was to enforce the law, there is no difficulty in ascertaining damages.* If it be found, as we have already urged, that it is the duty of the President under the Section 411 proviso to enforce the law, that difficulty disappears. The District Court can readily ascertain the difference between the rate required by law and the rate actually collected and give judgment for the difference. Although it is true that the statute contemplates that rates be fixed prospectively whereas a court would fix them retrospectively, that is a difficulty always found in rate cases, yet the authority of courts and commissions to grant reparation is unquestioned.

B. *Congress necessarily intended that damages be paid if duty were breached.* Congress, by creating between plaintiffs and their class, and defendant, legal relationships —the Act of 1950 and the Hay-Pauncefote Treaty—that have historically called for damages when duty is breached

showed its intent that damages be allowed plaintiffs in the present situation.

C. *To refuse damages positively obstructs the intent of Congress that tolls be charged as provided in the Act of 1950 and the Hay-Pauncefote Treaty.*

PART ONE.

Defendant unlawfully withheld and unreasonably delayed the prescription of reduced tolls.

I. Sections 411 and 412 provide that tolls be prescribed on the basis of Canal operations only, and without regard to the losses of defendant's collateral activities.

II. Because the collateral activities serve the Armed Forces, the Republic of Panama and the public generally, as well as the Canal, inclusion of their losses would violate the Hay-Pauncefote Treaty as well as the substantive formula provided by the Act of 1950.

III. The Canal's operating results called for the imposition of reduced tolls.

IV. The duty to prescribe tolls in accordance with the Section 412 formula took effect on the transfer of the Canal to defendant on July 1, 1951 and not at defendant's pleasure.

POINT I.

Sections 411 and 412 provide that tolls be prescribed on the basis of Canal operations only, and without regard to the losses of defendant's collateral activities.

This heading presents the central substantive issue in the case. If plaintiffs are correct on this issue, the GAO analysis, never challenged by defendant, leaves no doubt that for many years tolls "calculated to cover" the costs,

including interest, of Canal operation only would have been far less than 90¢ a laden ton.

We shall show that, first, the language of the statute, second, the legislative history, and, third, defendant's own admissions, including the opinion of its general counsel, establish the proposition asserted in the heading.

The rule of statutory construction in this type of case was declared by this Court, in enforcing in favor of a user against a canal company a statute fixing its tolls, to be that "any ambiguity in the terms of the grant [referring to the statute creating the company and providing for tolls] must operate against the corporation and in favor of the public, and the corporation can claim nothing that is not clearly given it by law." *Perrine* v. *Chesapeake & Delaware Canal Co.*, 8 How. 172, 192.

Plaintiffs submit that the statute clearly requires that tolls be fixed on the basis of the Canal activity only. The Court of Appeals so found without the slightest difficulty (R. 248-249):

> "That the defendant would defer toll changes in order to apply canal profits to cover its losses in other enterprises never occurred to the legislators. Although the cost formulae of the other ventures were not spelled out in the statute, each enterprise was expected to be self-sustaining and the annual commercial-style budget of the defendant corporation was expected to facilitate congressional scrutiny of the various operations . . . The men who spent three years hammering out a compromise toll formula for future operation of the canal did not mean to give the defendant's board of directors carte blanche to ignore the statutory mandate whenever the defendant's other business ventures were losing money."

If, however, defendant's argument—and it seems to us a lame one—should create any doubt in the Court's mind, that doubt should be resolved against defendant.

The language of the Statute. Section 412(b), as amended by the Act of 1950, provides that (Appendix A, 6a-7a):

> "Tolls shall be prescribed at a rate or rates calculated to cover, as nearly as practicable, all costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto, including interest and depreciation, and an appropriate share of the net costs of operation of the agency known as the Canal Zone Government".

The context of the statute and other circumstances demonstrate decisively that the expression "facilities and appurtenances related thereto" does *not* refer to defendant's railroad, shipping line, grocery stores and other collateral activities, but only can mean the locks, tugs, launches and similar facilities related directly to Canal operation.

The expression "Panama Canal, together with facilities and appurtenances related thereto" appears elsewhere in the statute in a context that establishes indisputably that Congress did not include the business activities in that expression.

Section 10 of the Act of 1950, enacting Section 256, Title 2, of the Code authorized the President to transfer to the corporation (Appendix A, 5a):

> (a) ". . . the Panama Canal, together with the facilities and appurtenances related thereto, and"
>
> (b) "any or all of the facilities and appurtenances heretofore maintained and operated by the Panama

Canal under authority of Section 51 of title 2 of the Canal Zone Code, as amended by section 2 of the Act of August 12, 1949 (ch. 422, 63 Stat. 601), and"

(c) "all or so much as he may determine to be necessary of the personnel, property, records, related assets, contracts, obligations, and liabilities . . ."

We know then from the identity of expression in Sections 10 and 12 that the properties included in the tolls formula comprised the properties of The Panama Canal, the unincorporated agency, included in (a) above, and not those included in (b) and (c). By reference to Section 51, Title 2, as amended by the Act of August 12, 1949, we know that the properties referred to in (b) are (Defendant's Brief, 157):

". . . docks, wharves, piers, drydocks, shops, yards, marine railways, salvage and towing facilities, dredging facilities, construction facilities, fuel-handling facilities, motor-transportation facilities, civil air terminals, power systems, water and sewer systems, warehouses, storehouses, hotels, a printing plant, living quarters and other buildings, and any other necessary facilities and appurtenances . . ."

As obviously a statute providing for transfer could not refer to properties the transferee already possessed, we also know that the expression "Panama Canal, together with the facilities and appurtenances related thereto" could not refer to the numerous "business activities" already in defendant's possession, received by it from the Panama Railroad Company (the New York company) in 1948.

By process of elimination the only possible conclusion is that the expression "Panama Canal, together with the facilities and appurtenances relating thereto" refers to

what defendant described in its first annual report as follows (R. 171):

> "Canal activities comprise those functions directly related to the waterway and transiting of ships, such as the marine operation, maintenance of the canal channel, operation and maintenance of the locks, meteorology and hydrographic work, and ferry service across the canal at Balboa."

When the President on June 29, 1951 issued his Executive Order No. 10263, he transferred to the defendant (16 F. R. 6333):

> "(a) the Panama Canal (the waterway), together with all the facilities, buildings, structures, and improvements related thereto, *and* (b) all other facilities, buildings, structures and improvements whatsoever now maintained and operated by the Panama Canal [with certain specified exceptions]."

Defendant argues that "facilities and appurtenances" are words of "art", which mean any business facility in the Zone (Brief, 85). Of course the words "facilities and appurtenances" can be applied to almost anything. The question at issue is, however, what is the meaning of the expression "the Panama Canal, together with facilities and appurtenances relating thereto"? Section 10 shows indubitably that that expression, as used in the Act of 1950, did not include the business activities, and President Truman's transfer order shows the same.

Allocation of interest and administrative expense. The statute expressly provides for the allocation of cost of Canal Zone Government. The Court may wonder why no express provision was made for the allocation of the other general expenses.

For many years defendant, its predecessor Panama Railroad Company (the New York company) and The Panama Canal, the unincorporated agency, had allocated administrative expense among activities and shown results on an activity basis, as we demonstrate in our discussion of defendant's "ambiguous bookkeeping", *infra* pp. 60-67. Apparently it was taken for granted that defendant would continue to do so.

The Company pays interest on investment (Section 246, Title 2, Canal Zone Code). Hence interest allocates itself on the basis of the investments in the respective activities—the basis on which the General Accounting Office has allocated interest for the purpose of determining the results of operation according to the statutory formula; cf. *infra* p. 55.

The Legislative History. The legislative history is clear that tolls were to be based on the Canal activity only and that the general expenses were to be allocated among defendant's various activities.

When an increase in tolls was first mooted in March, 1948, the shipping industry protested that non-Canal costs were being charged against tolls.

Speaking at a hearing of the Senate Appropriations Committee held on March 19, 1948, Mr. Frazer Bailey, President of the National Federation of American Shipping, said*:

> "There are many activities in the Canal Zone of civil, municipal and military character. There are railroad activities not connected with Canal transit; hotels, Government stores, sanitation, etcetera. When the costs of these activities increase it is not

* Civil Functions, Department of the Army Appropriation Bill, 1366.

an equitable answer to increase the transit tolls against commercial ships".

In considering the legislative history it is to be borne in mind that the purpose of the Congressional investigation was to obtain information which would lead to a fair allocation of costs as between the Canal operation and other Government activities in the Canal Zone in the light of the shipping industry's protest that tolls bore too heavy a share. Thus House Resolution 44, adopted February 28, 1949, which initiated the legislative process that eventuated in the Act of 1950, provided (95 Cong. Rec. 1617; Appendix I, 40a-41a):

> "*Resolved*, That the Committee on Merchant Marine and Fisheries or any duly authorized subcommittee thereof is authorized to make a full and complete study and analysis of the financial operation of the Panama Canal with particular reference *to the proper accounting and allocation of costs* attributable to—
>
> (a) the transit of the Canal by commercial, governmental, and military vessels of United States and foreign nations;
>
> (b) military activities of the United States in and connected with the Canal Zone;
>
> (c) United States civil government, including, but not limited, to sanitation, public schools, playgrounds, hospitals, and so forth;
>
> (d) business operations conducted under the supervision of the Governor General of the Panama Canal by the various business units of the Panama Canal and Panama Railroad Company;
>
> and to recommend to the Congress concerning *what elements of cost should be properly used in the future as the basis of a policy* to be followed in establishing and

levying tolls for the use of the Panama Canal for transit purposes."

The subcommittee appointed pursuant to this resolution reported that it could not recommend a fair allocation because the accounts were not sufficiently clear. Noting that "it is strange that the fixing of tolls should be a responsibility of the President" (43a), the report urged that the President cause the Bureau of the Budget to make a study of the Canal and recommend appropriate organizational and tolls policy changes (Report No. 1304, 81st Cong. 1st Sess., excerpts from which are printed in Appendix I, 41a-44a).

The Bureau made such a study. The bill that became the Act of 1950 sought to carry out its recommendations, with an exception immaterial here.

That study, speaking of the collateral activities, said in part (R. 99):

> "Sales and services to all others [all other than divisions of the Company itself and of the Canal Zone Government], including Government agencies, should be at prices over cost which may reasonably be expected to cover, in the aggregate, *the interest on the Government's investment and the Company's share of the expense of civil government and related activities.*"

Mr. Harold Seidman of the Bureau of the Budget was the Bureau's spokesman before the Congressional committees. Senator Byrd presided at the Senate Committee hearing, and Mr. Chambers was the Committee staff member assigned to the bill. The following colloquy occurred between them during the Senate hearing (R. 127-128):

> "Mr. Seidman. I can explain some of that difference fairly readily * * *. Then under the present

formula all the costs of civil government, health, and sanitation, are charged against tolls. The Panama Railroad Company does not contribute hardly anything to that. That is charged against tolls. This will be spread over the whole enterprise.

"Again taking very rough estimates, there would be about 50 percent. I think the Chief of the Management Division of the Panama Canal did provide estimates of about 53 percent of the 1949 figures would be against tolls.

"Mr. Chambers. When you redistribute the costs among various businesses like commissaries, et cetera, *the net result will be they will have to be self-sustaining and contribute their share toward the overall operating costs of the Canal.*

"Mr. Seidman. It is the intention of this bill that the whole enterprise shall be self-sustaining and conducted without either direct or indirect cost to the United States Treasury.

"Mr. Chambers. To whatever extent that comes about, that will be reflected in reduced charges against the ships going through the Canal?

"Mr. Seidman. Yes; to the extent that these costs are borne by other than shipping, they will naturally be reflected in the tolls.

"Senator Byrd. Interest on investment—

"Mr. Seidman. It includes interest on the investment. *In estimating the interest, of course, each of these business operations, any business has to carry its share of the interest, too, in proportion to the investment.*"

Another colloquy between Mr. Seidman and Mr. Chambers was as follows (R. 129):

"Mr. Chambers. Coming back to these commissaries and other business that you operate down there, in figuring out the amount they have to pay,

> *the interest they have to pay,* are you leaving in the interest on capital investment at the time of construction?
>
> "Mr. Seidman. No."

The railroad industry has naturally and historically been interested in keeping tolls high. Its representative at the hearing, Mr. Gregory Prince, noted with satisfaction that the traditional profits of the business activities would not benefit tolls, saying (R. 140):

> "In view of the requirement in paragraph (b) of section 412 of title 2 of the Canal Zone Code as it would be amended by this bill, that tolls be prescribed at a rate calculated to cover all costs of maintaining and operating the Canal, *it seems clear that revenues from the railroad and other business activities of the new company are not to be used to subsidize the operation of the Canal itself.*"

In short, Mr. Prince assumed—and he was not contradicted—that the toll rate was to be calculated without regard to the operating results of the business activities.

As noted below, *infra* pp. 65-66, what had been for many years the large profits of the business activities have now turned to losses, but the principle of the statute is equally applicable.

The report of the House Merchant Marine Committee, recommending the bill, said in part (Appendix C, 15a-16a):

> "Your committee is informed that the resulting allocation is expected currently to assess approximately an equal division of the expense of health, sanitation, and civil government between the transit division and other corporate divisions. . . .
>
> "It is generally agreed that in calculating the toll rate there should be excluded from the capital base all investment in equipment and structures, of

> business operations which are not directly related to operation of the Canal, all health, sanitation, and civil government facilities and equipment."

The Senate Armed Services Committee reported in part (R. 165-166):

> "In addition to paying for the cost of operating and maintaining the Canal, it is estimated that about 50 per cent of the cost of civil government would be supported by the tolls collected from transit vessels. The remainder of the cost of civil government would be borne by the other business activities such as hotels, commissaries, etc."

The Senate Report contained a kind of pro forma work sheet, showing how the formula would work in actual practice. This work sheet gives figures for the Canal only, as distinguished from defendant generally. That is to say, the calculation was made on a Canal activity basis and not a Company-wide basis.

Thus "Revenue" was taken by this work sheet to comprise "Commercial tolls", "Government transits (now exempt)" and "Other outside revenue" (R. 167). This "Other outside revenue" was estimated at $2,300,000 (R. 167), which was approximately the amount of revenue derived from the pilotage and tug services related to Canal operation in the first year of defendant's operation of the Canal (the exact figure was $2,347,861 [R. 25]); it has run slightly higher since, R. 27, 29. Expenses exclusive of interest and cost of Canal Zone Government were estimated at $18,500,000 (R. 167), also approximately what Canal operating expense proved to be in 1952 and 1953 (R. 25, 27; figures on the same basis are not available for subsequent years). Aggregate revenue was estimated at $28,800,000 and aggregate expense at $30,200,000 (R. 167). Obviously

these estimates were *not* Company-wide. The Company's revenue in its first year was $100,050,488 and its expenses, including cost of Canal Zone Government and interest—which were included in the pro forma work sheet—were $97,681,458 (R. 25, 26).

Defendant's own admissions, including the opinion of its general counsel, have recognized that the Act of 1950 required that the collateral activities were to bear their share of general expense.

The 1952 budget program. Defendant's budget program for 1952 squarely recognized that tolls were to be based on the Canal activity, that the financial results of its different activities were to be separately self-sufficient and that the general expenses were to be allocated among them to accomplish that result.

Annexed in Appendix F hereto are excerpts from defendant's budget programs for 1951, 1952 and 1958. These programs are published in the President's Budget, made public every January and applicable to the fiscal year ending the second June 30 following. The budget program for 1952 was therefore prepared in the latter part of 1950, at the time of the consideration and enactment of the Act of September 26, 1950.

The analysis accompanying the 1952 budget program states that defendant's operations consist of a variety of activities which for budget purposes are tentatively grouped in three main categories: (1) Canal activities, (2) commercial activities, and (3) quarters (Appendix F, 27a).

For each group of activities the budget program shows general expenses allocated as follows (Appendix F, 30a-32a):

	Canal	Commercial	Quarters
Interest	$7,467,000	$ 620,000	$249,000
Cost of Canal Zone Government	$4,158,000	$2,384,000	$312,000
General and Administrative	$ 839,000	$1,160,000	$ 51,000

The 1952 budget program was accompanied by an explanation, substantial excerpts from which are printed in Appendix F, 26a-29a. This explanation describes the defendant's various activities, including the Canal activities. With respect to Canal activities, the explanation comments that at the anticipated level of traffic there will be a deficit, but "a rate increase is projected, to be effective for the latter half of the fiscal year, allowing time for the Corporation to give due notice" (Appendix F, 29a). This rate increase will, the explanation contemplates, reduce the deficit.

The explanation also contemplates a deficit for the other activities, noting that the deficit is to "*be entirely attributed to classifying interest and the proportionate cost of Canal Zone Government as expenses of commercial activities*" (Appendix F, 29a). But the explanation in no respect implies that the higher toll rate be used to make up the deficit for the other activities. On the contrary, the explanation anticipates an "increase in income . . . will probably have to be obtained through higher rates or charges for services rendered, *particularly for some of the commercial activities and quarters*" (Appendix F, 28a).

The explanation takes for granted that it will be necessary to make allocations as between the various activities (Appendix F, 27a). The reference to allocations can only refer to general expenses, for direct expenses allocate themselves.

Thus at the time of the enactment of the Act of 1950 defendant believed that the various activities were to be separately self-sufficient, that the prices to the commercial activities would have to be increased to pay general expenses, and that it was in order to increase tolls, albeit solely to make the tolls activity self-sustaining.

The opinion of General Counsel. In an opinion submitted to the Governor* in December, 1953 defendant's General Counsel advised that the prices charged by the activities must suffice to pay their share of general expenses. Our information on this subject is derived from the following paragraph in the GAO audit report for 1954 (R. 58):

> "The Company's practice of establishing relatively low prices for commodities and services has resulted in fringe benefits to Canal organization employees and contributed to the losses sustained by business activities. Generally, sales of commodities and services to employees have been considered a transaction within the Canal organization, and, as such, the prices charged have not included all elements of Canal Zone Government costs and other general corporate expenses. In December 1953 the Governor and the comptroller prepared a pricing policy statement for submission to the board of directors. *Basically the policy conformed to the Company's practice for the past 2 years. However, the statement was not officially presented to the board because the Company's general counsel stated that in his opinion the policy was not in accord with the intent and purposes of the basic legislation.* We concur in the opinion of the general counsel that, insofar as transactions with the Company are concerned, employees have the same status as other customers. As of December 10, 1954, no further action had been taken by the management or board of directors to formalize the existing pricing policy."

Plaintiffs sought to get a copy of this report by deposition, interrogatories and requests to admit, any privilege that may have originally applied to this opinion having been waived. *Himmelfarb* v. *United States*, 175 F. 2d 924,

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* Who is also defendant's President, Section 247, Title 2, Canal Zone Code.

938-939 (C. A. 9th). On defendant's motion the District Judge stayed these discovery proceedings by his orders of December 22, 1955 and January 4, 1956 (R. 209-210; 212-213).

In the context, and in the light of defendant's extreme reluctance to reveal this opinion, the only possible conclusion is that defendant's General Counsel advised that defendant had no right to pay all defendant's general expenses from tolls, but that the other activities must pay their share.

Defendant's General Counsel is Hon. Paul A. Bentz, a career lawyer in the Canal Zone civil service and codifier of the Canal Zone Code. What right defendant's then President (Brig. Gen. J. S. Seybold) had to disregard this opinion and to withhold it from the Board of Directors is difficult to conceive.

Throughout this litigation plaintiffs have clamored for the production of this opinion and more or less taunted defendant for its secretiveness about it, *e.g.* R. 202-203; plaintiff's petition for certiorari in No. 252, pp. 12-13. But defendant has been apparently so afraid of the effect of this opinion that it has preferred to endure the taunts. Although defendant made the opinion available to the General Accounting Office, it denies even this Court that assistance.

Defendant recognizes its obligation in its 1954 report. The duty to allocate was also recognized by defendant in its 1954 report. That report (R. 175) referred to bills pending in Congress to amend Section 412(b) "so as to redistribute the corporate burden internally in order to shift a relatively larger portion of the burden on the tolls activity, and, correspondingly, to decrease the portion of overall obligations which is to be borne by other activities of the Com-

pany''—a remark which showed that defendant was aware how Section 412 then did, as it now does, distribute the "overall obligations," because, as noted, it is by charging its general expense against tolls that defendant has used tolls to absorb the losses of its other ventures.

POINT II.

Because the collateral activities serve the Armed Forces, the Republic of Panama and the public generally, as well as the Canal, inclusion of their losses would violate the Hay-Pauncefote Treaty as well as the substantive formula provided by the Act of 1950.

To absorb the losses of the collateral activities violates not only the policy laid down by the Act of 1950, but also the Hay-Pauncefote Treaty, incorporated in Section 412(d) by that Act, requiring that t s be "just and equitable."

The reason is that the business activities are not exclusively engaged in serving the Canal, but serve all U. S. Governmental activities in the Canal Zone, referring primarily to the Armed Forces, and also the Republic of Panama and the public generally. Accordingly not only would it not be reasonable under our municipal rate-making law to include the business activities in the tolls base, but such inclusion would also violate the policy of Congress, in accordance with the Hay-Pauncefote Treaty, that costs of national defense should not be charged against tolls. Thus Congress sought through the years that it was "hammering out" the Act of 1950 (R. 249) to avoid burdening tolls with national defense cost ; in fact, as House Resolution 44 shows, that was the primary purpose of the Act.

Before developing this point we shall, however, describe the episode of 1912-1913 when the British and United States

Governments seemingly agreed that "just and equitable" tolls meant tolls sufficient to pay Canal costs only.

Foreign Minister Grey asserts without objection from Secretary Knox that tolls should cover Canal operating costs and interest only. The meaning of the "just and equitable" tolls provisions has apparently been discussed only once between the British and the American Governments. At the time of the controversy over the exemption for United States coastwise traffic provided by the Act of August 24, 1912, Sir Edward Grey, the British Foreign Minister, maintained that the exemption violated not only the anti-discrimination provision but also the "just and equitable" tolls provision of the Treaty. In a memorandum written by Sir Edward Grey on November 14, 1912, and handed to United States Secretary of State Philander C. Knox by British Ambassador James Bryce on December 9, 1912, the Foreign Minister asserted (*Foreign Relations of the United States—1912,* p. 486):

> "This rule also provides that the tolls should b 'just and equitable'. The purpose of these words was to limit the tolls to the amount representing the fair value of the services rendered, i.e., *to the interest on the capital expended and the cost of operation and maintenance of the Canal.* Unless the whole volume of shipping which passes through the Canal, and which benefits all equally by its services, is taken into account, there are no means of determining whether the tolls chargeable upon a vessel represent that vessel's fair proportion of the current expenditure properly chargeable against the Canal, that is to say, interest on the capital expended in construction, and the cost of operation and maintenance."

Secretary Knox submitted a memorandum dated January 17, 1913 to the United States Charge d'Affaires in

London, for transmission to the British Government. He made no objection to Sir Edward Grey's interpretation of the Treaty*, but argued that it was not relevant because the toll rate then tentatively fixed, on the basis of estimates, did reflect United States coastwise traffic (*Foreign Relations of the United States—1913*, p. 545).

Thus both Governments were apparently in agreement that under the Treaty the toll should be based on the results of operation of the Canal—not the Canal together with various other activities.

It is quite true that the particular aspect in which the question was then presented involved not the taking into account of the losses of non-Canal activities, but the alleged failure to take into account what were, at least in the opinion of the British and a large section of the American public, all of the legitimate earnings of the Canal. However, these two aspects are opposite sides of the same coin.

THE BUSINESS ACTIVITIES SERVE THE ARMED FORCES, THE REPUBLIC OF PANAMA AND THE PUBLIC GENERALLY AS WELL AS THE CANAL; AND THEIR LOSSES ARE TO AN APPRECIABLE EXTENT DUE TO NATIONAL DEFENSE POLICY.

The collateral activities do not service the Canal exclusively; on the contrary, they also service the Army, the Navy, the Air Force, the Republic of Panama and the public generally. In a letter written on May 9, 1945 to the Chairman of House Committee on Expenditures in the Executive Departments in connection with the bill that became the Government Corporation Control Act, the Secretary of War (Mr. Stimson) asserted (H. Rep. No. 856, 79th Cong. 1st Sess. 61-62):

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* That is, in this respect. Secretary Knox did disagree with Sir Edward Grey's interpretation of the anti-discrimination clause.

"The Panama Railroad Company is essentially a service agency for the Panama Canal, the Army, the Navy and the Republic of Panama, and it is required to adapt its operations without delay to the changing needs of the organizations and interests which it serves. For example, the decision was made some months ago to base in the Canal Zone a large fleet of vessels engaged in traffic of vital importance to the war in the Pacific, and the Panama Railroad Company was required on extremely short notice to assume responsibility for furnishing food, clothing, and other necessities to those vessels, a task equivalent in magnitude to supplying an additional population of over 15,000 persons and involving considerable increases in both administrative and non-administrative expenses . . ."

"The nature and magnitude of the Company's operations depend almost entirely upon the general level of activity of the various Government agencies in the Canal Zone and of private and governmental business in the Republic of Panama. . . . The demands upon the Company by the Republic of Panama will depend upon general world conditions and upon Canal Zone activities, which are reflected in Panama . . .

". . . In addition to furnishing railroad and other service to various Government departments and establishments in the Canal Zone at rates much below those provided for in the Company's commercial tariffs, the Company's steamship line carried Government cargo and passengers during the 20 years prior to 1942 (when the steamers were requisitioned for use for direct war purposes) at rates which represent reductions from tariff of more than $10,000,000 . . ."

Of special interest is Secretary Stimson's last sentence quoted above, in which he pointed out that the Government

got concessions from tariff of over $10,000,000. Obviously under such circumstances inclusion of the shipping line's losses would constitute a subsidy from the tolls-payers to the Government to that extent.

We quote in Appendix E, 20a-22a, defendant's analysis of its activities in its budget program for 1951. Each activity is there described. These descriptions show that most of the activities serve other Government agencies, the Republic of Panama and the public generally. None serve the Canal exclusively.

Thus the railroad "serves The Panama Canal, the United States Army, Navy, and Air Force, and other Government agencies on the Isthmus, and also performs the functions of a common carrier in meeting the needs of the Republic of Panama" (20a); the harbor facilities serve the ports of "Cristobal and Balboa, either for ultimate destination in the Canal Zone or the Republic of Panama, or for transshipment to points beyond" (21a); the telephone system provides service for "The Panama Canal and for the civilian communities in the Canal Zone [and] to the Departments of the Army and Navy and to the Government of Panama" (21a), etc.

In *New York ex rel. Rogers* v. *Graves*, 299 U. S. 401, this Court, discussing the activities of the Panama Railroad Company (the New York company), noted that it served the Armed Forces and the public, and that its ships "carry freight for the government of the United States to the Canal Zone at 25% less than customary tariff rates" (p. 403). Although characterizing the Company as an "auxiliary" of the Canal, the context shows that the reference was to the complex of Governmental activity in the Zone; the Court held that the Company's personnel was exempt from state income tax because the Company was

primarily engaged in "governmental operations" (pp. 407-408).

The presence of the military greatly increases defendant's non-Canal costs. In his 1954 audit report, the Comptroller General had this to say (R. 41):

> "Canal organization officials have no control over military activities, but the Canal organization activities are greatly affected by the presence of the Armed Services. Armed Services personnel and their dependents comprise about half of the total population, and a significant part of the land area is under military control."

In fact 95 square miles of the Zone are under the control of the Armed Services, as compared with only 13.6 square miles under defendant's control (Appendix I, 48a). The Armed Services are increasing their activities. By Article VIII of the Treaty with Panama concluded January 25, 1955 the Republic granted to the United States an additional area of 7,857 hectares for maneuvers and military training. TIAS, 3297.

In his 1953 report the Comptroller General said (p. 43):

> "The defense establishment exerts a significant influence on the scope and efficiency of many of the Canal organization's activities. About one-half of the total population of the Zone consists of military and civilian personnel of the Armed Services and their dependents, and a large part of the developed land area is restricted to military purposes. The responsibility for the construction and maintenance of public roads, schools, hospitals, utilities, and other community services falls upon the Canal organization. The military agencies' operations and personnel have greatly increased the volume of these services. Much of the heavy vehicular traffic is attributable to the military. Consequently, more

substantial highways and roads and more frequent and more costly maintenance are necessary. The greater volume of traffic necessitates more extensive police and court facilities. More and larger schools and more teachers are required to accommodate the greater juvenile population. Of all these increased costs, prior to the 1954 fiscal year, only the proportionate costs of the school system were subject to reimbursement by the military and other agencies; the remainder were borne by the Company."

The losses of the business activities are substantially due to national defense policy. Another and independent reason why it would be inequitable to charge the losses of the "business activities" against tolls is that the losses are to a large extent attributable to a national defense policy, viz., the employment of a large proportion of United States citizens in jobs that could be filled locally.

The cost of such a large proportion of United States citizens, not justifiable on any ground other than national defense, was stated by GAO in its 1954 audit report as follows (R. 56-58):

"The losses in the business activities are attributable in a large degree to the high cost incurred in employing United States citizens in positions that could be filled locally. United States citizens constitute a large community in the Canal Zone and are used in all except the very lowest grades of labor. To obtain United States citizens for work in the tropics, the Company incurs abnormal expenses in the form of premium wages,* additional leave, free vacation travel, recruitment, and repatriation. Also, the Company bears most of the net cost of furnishing services generally provided by state and municipal

* United States nationals are paid according to their ratings (GS numbers) under the Classified Civil Service Act, 5 U. S. C. §1081, and also receive the benefits referred to by GAO.

governments by including only a part of these costs in prices to the customers of the business activities.

"A report entitled 'Study of Overseas Personnel any Pay Practices of Sixteen Private Firms' jointly prepared in November 1952 by the Bureau of the Budget, Civil Service Commission, Department of State, and Department of Defense states that (1) the number of United States citizens employed by the firms under study ranged from one-half of 1 percent to 5 percent of the total number of overseas employees and (2) native workers are employed in almost every category of position including responsible technical and executive posts.

"The Virgin Islands Corporation, a wholly owned Government corporation in the Caribbean area, employs less than 10 continental United States citizens out of a total of about 1,200 employees who, although United States citizens, are natives of the Virgin Islands or Puerto Rico and receive compensation comparable to that paid by businesses in that area.

"From 1921 to date, except for the World War II period, about 25 percent of Canal organization employees have been United States citizens. U. S. rate employees in the Canal Zone hold positions in all categories except journeymen's helpers, day laborers, porters, custodians, stevedores, sales clerks, messengers, etc. This compares unfavorably with the practice of commercial companies operating overseas. The wisdom of operating supporting facilities for a disproportionate number of United States citizens is seriously questioned.

"We believe that the proportion of United States citizens could be substantially reduced at the present time by employing Panamanians in many semiskilled and clerical jobs. Under a proper program of apprenticeship and training, Panamanians could fill positions requiring greater skills and responsibilities. The transition would not mean a

wholesale firing of present employees but could be accomplished largely by attrition. There is an urgent need for long-range planning, full-time direction, and continuity of management to cope with these problems."

TO INCLUDE THESE ACTIVITIES SERVING OTHERS, PRIMARILY THE ARMED FORCES, WOULD VIOLATE DOMESTIC RATE-MAKING PRINCIPLES, THE POLICY OF CONGRESS THAT TOLLS NOT BE REQUIRED TO BEAR NATIONAL DEFENSE COSTS, AND THE HAY-PAUNCEFOTE TREATY.

This Court has often had occasion to consider rates and rate-making. Its view has always been that a business whose rates were subject to regulation was entitled to earn a return on only property "used and useful" in the service rendered, and that property merely connected with the service was not to be taken into account. *St. Joseph Stockyards Co.* v. *United States*, 298 U. S. 38; *West Ohio Gas Co.* v. *Public Utilities Commission*, 294 U. S. 63, 70; *Western Distributing Co.* v. *Commission*, 285 U. S. 119, 124, 126; *San Diego L. & T. Co.* v. *Jasper*, 189 U. S. 439, 446; cf. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591.

Obviously, the collateral activities are not used in the Canal service directly. Plaintiffs concede that if the collateral activities *exclusively* served the Canal, and were essential for that purpose, cf. pp. 65-69, a case could be made for their inclusion in the rate-making base. As the opposite is true, our municipal law requires their exclusion.

Congress has recognized that a distinction should be drawn between the costs of national defense and of Canal operation. Thus in Section 246(b), Title 2, Canal Zone Code, in providing for the amount at which property shall be transferred to defendant, Congress has specified that

"there shall be excluded from such amount any portion of the value of the transferred property which is properly allocable to national defense." Again in Section 246(d), Congress provided that there be excluded from defendant's surplus "losses incurred through directives based on national policy and not related to the operations of the corporation." As we have already noted, the primary purpose of the Act of 1950 was to insure that tolls were not burdened with national defense costs.

The Hay-Pauncefote Treaty provides that tolls be "just and equitable." Our law of rates shows that inclusion of collateral activities such as defendant's in the rate base is not just and equitable. In its recognition that national defense costs are not properly charged to tolls, Congress correctly applied the Hay-Pauncefote Treaty.

POINT III.

The Canal's operating results called for the prescription of reduced tolls.

The GAO 1954 audit report, released May 16, 1955, reviewed defendant's operations from July 1, 1951 to June 30, 1954 as follows (R. 42-43):

> "The legislative hearings and reports of congressional committees preceding the reorganization indicate the intention that the Company would be self-sustaining and the canal and business activities would each bear its own costs of operation, including interest, depreciation, and an appropriate share of the net cost of Canal Zone Government. . . .
>
> "The Company has had 3 years' operating experience under the Federal charter (2 Canal Zone Code 245 to 258, inclusive), as amended by the act of September 26, 1950 (64 Stat. 1038). The Com-

pany, as a whole, has been self-sustaining. However, the Company did not have available for our examination an analysis to determine the financial results by activities. We have prepared such an analysis by allocating general corporate expenses (interest, net cost of Canal Zone Government, and administrative and other general expenses) to the activity operating results reported by the Company. . . .

"The analysis of the Company's reported net income of $13,000,000 for the 3 years since the reorganization shows that, contrary to the apparent expectation of the Congress, the canal activity had a net income of $28,000,000 and business activities had losses of $15,000,000. The term 'business activities' as used in this report includes all commercial and service activities, except the canal activity. . .

"* * * Thus the net income from the canal activity is being used to offset losses from business activities.

". . . We interpret the legislation as precluding any losses sustained by the Panama Canal Company in the operation and maintenance of business facilities being included in the basis for determining tolls under section 412(b). Based on the financial results of the canal activity for the past 3 years, *toll rates would have to be reduced substantially if hearings were held at this time.* (See recommendation to Cong., p. 8.)"

The analysis prepared by GAO and set forth in its 1954 report is shown on the opposite page (R. 53):

	"Three years ended June 30, 1954"		
	Canal activity	Business activities	Total
"Revenue	$112,861,870	$141,958,379	$254,820,249
"Operating expenses, including adjustments in 1954 to prior years' retained income	44,436,726	129,556,812	173,993,538
"Operating income	68,425,144	12,401,567	80,826,711
"General corporate expense (allocated by General Accounting Office):			
Net cost of Canal Zone Government (note a)	19,153,898	12,140,136	31,294,034
Interest payable to U. S. Treasury (note b)	18,518,673	5,439,180	23,957,853
Administrative and other general expenses (note c)	2,916,069	9,630,222	12,546,291
	40,588,640	27,209,538	67,798,178
"Net income (—loss)	$ 27,836,504*	—$ 14,807,971	$ 13,028,533

"(a) Net costs of Canal Zone Government are allocated on the revenue ratio defined in section 412(b) of the Canal Zone Code. This results in an allocation of 65 percent of these costs to the canal activity for 1954, 63 percent for 1953, and 55 percent for 1952. • • •

"(b) Interest for the fiscal years 1952, 1953, and 1954 is computed at 1.05, 2.05, and 2.342 percent, respectively, on $377,764,946, the net direct investment of the Government in the Company. • • • About 78 percent of this (gross investment in fixed properties) is invested in facilities of the canal activity and the remaining 22 percent in facilities of all other activities. This relationship has been approximately the same for the past 3 years.

"(c) Most of the administrative and other general expenses were allocated on a direction-of-effort basis; the remainder was charged directly to the applicable activity. The direction-of-effort basis was used by the Company in 1953 for statistical purposes and seems reasonable. It results in an allocation of approximately 25 percent to the canal activity."

* The amount of $25,000 a day as the overcharge is reached by dividing $27,836,504 by 1,096, the number of days involved. The amount of $4,000 a day as the original plaintiffs' share of the excess is based upon the ratio of tolls paid by plaintiffs to aggregate tolls (R. 10, 53).

This table presents the operating results at the time suit was brought in September 1955. Since then defendant has published annual reports for fiscal years ended June 30, 1955, 1956 and 1957. The reports for 1955 and 1956 show that the toll rate continues to be excessive. The 1957 report does not contain data affording a basis for the computation (cf. footnote 4, *supra* p. 18). The following table shows for 1955 and 1956 for the Canal activity (a) operating income, i.e., gross income less direct operating expense, (b) the Canal's share of general expense using the allocation factors used by GAO, and (c) excess income.

	Operating Income	General Expense	Excess
1955[1]	$22,140,000	$14,818,000	$ 7,322,000
1956[2]	$24,718,718	$14,712,445	$10,006,273
1956[2]	$24,719,000	$15,879,000	$ 8,840,000
1957		not available	

[1] GAO audit report for 1955, p. 20.

[2] The upper 1956 line computes the excess according to the allocation factors continuously used by GAO for the years 1951-1955. However, for 1956, GAO, at the urging of defendant, abandoned the direction-of-effort method of allocation which it had previously used and which defendant had used in 1952 and 1953 when it published allocated figures. The result was to diminish the excess income of the Canal activity to the extent of about $1,136,000 (cf. 1956 audit report, 17, 18).

According to defendant's report for 1955 in that fiscal year it paid a dividend of $10,000,000 and applied $3,943,482 to the acquisition of fixed plant, that is, to the acquisition of new capital assets (Report, 46). The dividends purportedly were paid under Section 253, Title 2, of the Canal Zone Code.*

* Payment of these dividends was a violation of the tolls formula which makes no provision for dividends. Section 253 was enacted by the Act of 1948 which provided for the federal incorporation of the Panama Railroad Company (the New York company)

According to defendant's report for 1956, in that fiscal year it paid a dividend of $5,000,000 and applied $4,787,865 to the acquisition of fixed plant (Report, 40).

As its other activities were operating at a loss—after allocation of general expense—this means that tolls, in addition to paying all general expenses, provided the funds for these large additional expenditures.

At the request of counsel, plaintiffs' accountants prepared a cumulative statement of the source and disposition of defendant's funds July 1, 1951—June 30, 1957 as shown by defendant's annual reports. Appendix J, 50a. This statement shows that from earnings since July 1, 1951 defendant has done the following:

1. Paid dividends of $15,000,000;

2. Applied $38,000,000 to the acquisition of fixed plant;

3. Increased cash by $8,553,000;

4. Increased the excess of notes and accounts receivable over current liabilities by $602,000.

In addition, defendant has used tolls to absorb $27,836,504 losses of the business activities for the period July 1, 1951—June 30, 1954 alone and probably an even greater additional amount since that time.

It is readily apparent that if the Section 412 formula were enforced, tolls would be "reduced substantially", as the Comptroller General noted in his 1954 audit report, *supra* p. 55.

(Appendix A, 4a). That Company, as already noted *supra* p. 15, had been highly profitable for many years and paid large sums in dividends. Because it was expected that its activities would continue to be profitable, Section 253 was not repealed at the time of the enactment of the Act of 1950.

The Comptroller General's report provides forceful and unanswered evidence that, on the basis of results of operation of the Canal activity, defendant should long ago have prescribed reduced tolls.

Defendant has sought to make out in its petition for a stay and its petition for certiorari, and to some, albeit lesser, extent in its present brief, that this is a controversy between accountants in which the courts have no right to meddle; that the Court of Appeals has wrongly inflicted, in the name of the Government Corporation Control Act, the Comptroller General's accounting theories on defendant.

This theory is unfounded.* Plaintiffs never argued and the Court of Appeals did not hold that, because of the GAO report, tolls should be prescribed on the basis of Canal operations; both the Court of Appeals and the plaintiffs have relied on Section 412 for their view that the statute did not permit absorption of the losses of the business activities.

The significance of the GAO report is evidentiary. Because of defendant's concealment effected by "ambiguous bookkeeping," as the Court of Appeals described it (R. 249), plaintiffs were not able to prove, until the publication of the GAO report, what the results of the Canal activity were. The Comptroller General, because he had no

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* The straw from which defendant has tried to create this issue is prayer No. 4 of the complaint (R. 8) and of the motion for summary judgment (R. 11), that in prescribing tolls defendant be compelled to use "accounts [not] less favorable to plaintiffs and their class than those determined by the General Accounting Office." But, as the preceding prayers and the complaint make clear, prayer No. 4 was intended to apply only *after* the courts had determined, as a matter of law, that defendant must prescribe tolls as required by the statute, that is, on the basis of the Canal operation. Because it was thought to be premature plaintiff never argued the theory of prayer No. 4 to the Court of Appeals. And there is not a word in the opinion of the Court of Appeals to suggest that it thought the GAO's statutory construction binding on defendant.

doubt that the statute required that tolls be prescribed on the basis of the Canal activity, showed the enormous profits of the Canal as contrasted with the losses of the business activities.

The forceful character of the Comptroller General's analysis is confirmed by defendant's failure to answer it. There lurk here and there in defendant's brief intimations that it disagrees with the Comptroller General* but nowhere does defendant affirmatively show its own analysis. Defendant's expressions of disagreement (e. g., Brief, 78) apparently relate to statutory interpretation, not to matters of accounting. Defendant has wholly defaulted respecting evidence as to the financial results of the Canal activity.

This policy of silence and concealment runs far back. The Comptroller General did not make his allocations because he disagreed with defendant's, but because defendant had none to offer, or refused to make them available. Thus the GAO 1954 report said (R. 42):

> "However the Company did not have available for our examination an analysis to determine the financial results by activities."

The 1955 report stated at p. 18:

> "During our 1955 audit report we again requested the Company to furnish an analysis of financial results by activity. Although we were

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* For instance defendant suggests (Brief, 78) that the losses of the business activities are part of the "costs of maintaining and operating the Panama Canal." But defendant's own financial reports show no such artificial concept of maintenance and operation costs (R. 25-30; cf. Appendix F, 30a; Appendix G, 33a-34a); on the contrary they treat such costs as applicable to the Canal activity only. Detailed tables not printed in the Record show even more clearly what defendant has regarded as the costs of maintaining and operating the Panama Canal, e. g., 1952 report, p. 42; 1953 report, p. 51; 1954 report, p. 49.

informed that an analysis had been prepared, it was not made available for our use."

Defendant's attitude was one of silence and concealment to others and the public generally as well as to the GAO auditors, as we shall proceed to show.

Defendant "concealed" the situation by "ambiguous bookkeeping".

The Court of Appeals said that defendant "concealed" what it was doing by "ambiguous bookkeeping" (R. 249). Unambiguous bookkeeping would have brought about much earlier a demand for reduced tolls and would have simplified the proof of the plaintiffs' right to the reduced tolls. It would have subjected to Congressional scrutiny the losses of the business activities. We list below illustrations of defendant's "ambiguous bookkeeping".

Failure to show results of operation on an activity basis. Prior to fiscal 1952, defendant's annual reports and those of its predecessor, Panama Railroad Company (the New York company), broke down general expenses, other than a relatively small sum for pensions, between its various divisions, and showed net income on a divisional basis. Appendix D, 18a. It has never done so since it acquired the Canal.

Failure to comply with requirement of Government Corporation Control Act that budget programs show estimated results of operation on an activity basis. The Government Corporation Control Act, 31 U. S. C. §847, requires Government corporations to submit annually budget programs showing "estimates of operation by major types of activities."

Obviously to do so requires allocation of general expense. Prior to its acquisition of the Canal defendant complied

with this requirement; its budget program for 1951, annexed as Appendix E, 23a-25a, shows administrative expense allocated to each activity.

Defendant's 1952 budget program, annexed as Appendix F, 26a-32a, prepared in the fall of 1950 and submitted in January, 1951, when everyone's mind was familiar with the legislative history, also allocated general expenses to each activity including the Canal activity, and therefore complied with 31 U. S. C. §847.

As time went on defendant's budget programs contained less and less allocation, and no subsequent budget program showed estimated results of operation for the Canal activity. Beginning with 1956, the budget programs made no allocation whatever. 1953 Budget, pp. 725-727; 1954 Budget, pp. 684-685; 1955 Budget, pp. 631-637; 1956 Budget, pp. 647-649. We annex schedules of defendant's 1958 budget program, Appendix G, 33a-34a, showing the failure to estimate the results of the Canal activity and to allocate general expense. By this device the budget programs indicate that the business activities are operating on a break-even basis. As GAO said in its 1953 report (p. 50), "From the standpoint of sound accounting and financial reporting, there is no justification for this action."

Meanwhile other multi-activity Government corporations continue to comply with 31 U. S. C. §847. We annex as Appendix H, 35a-39a, the 1958 budget programs of the Tennessee Valley Authority and the Virgin Islands Corporation. These budget programs show estimated results of operation on an activity basis in compliance with law. General expense—that is, administrative expense and interest—is allocated to each activity.

Write-ups of capital account: (a) *Reversal of channel entries.* In fiscal 1954 defendant reversed its treatment of Canal channel costs to the extent of $34,097,996 (R. 177).

This sum had been charged to "operations", or "expensed", as the expression is, over many years, apparently since the Canal was opened to traffic in 1914. By arbitrary action defendant capitalized these items. The effect was to add interest costs of slightly over $1,000,000 a year (R. 177).

Thus tolls, which paid these costs as operating expenses 1914-1954, are now required to pay them over again as interest.

(b) *Reduction in accumulated depreciation.* Also in fiscal 1954 defendant arbitrarily extended the service life of many items of equipment, thereby reducing accumulated depreciation by $11,283,917 (R. 177). In other words, having used tolls to pay depreciation costs, defendant, by this bookkeeping adjustment, will require tolls to pay that depreciation over again.

Payment of large sums of interest to the U. S. Treasury without warrant in law; the unauthorized and unlawful "valuation of assets." "Oh, what a tangled web we weave. . . ."*

The Act of 1948, enacting Section 246(c), Title 2, of the Canal Zone Code, directed defendant to pay interest to the U. S. Treasury "on the net direct investment of the Government in the corporation, as defined in paragraphs (a) and (b) of this section, and shown by the receipt described therein . . ." (Appendix A, 3a).

According to note 8 to the financial statements in the GAO 1954 audit report (R. 72), the amount of the receipt had never been changed from the original figure of $1. Accordingly defendant had no authority to pay interest to the U. S. Treasury beyond a few cents on the $1. Defendant has, however, paid large sums in interest, $23,957,853 as of June 30, 1954 (R. 32), plus $9,043,766 in 1955 (Report, 53),

* Scott, *Marmion*, Canto VI, Stanza 17.

$8,590,710 in 1956 (Report, 47) and $8,867,932 in 1957 (Report, 20).

The real offense, however, is not so much in the payment of the interest. Congress undoubtedly intended that defendant pay interest on its investment in the Canal, as distinguished from the nominal figure of $1. Plaintiffs have no objection to its doing so.* Defendant became involved in these unauthorized interest payments because of its violation of Section 246(b), Title 2, of the Canal Zone Code. That paragraph requires that all "transfers of property to" defendant by another Government agency "*shall be at such appropriate amount or amounts as shall be agreed upon* between the corporation and the agencies concerned and approved by the Director of the Bureau of the Budget," the amount to be stated in a cumulative receipt.

When the Canal was transferred to defendant on July 1, 1951 this statutory command was not observed. Hence the receipt was not increased.

Instead defendant embarked on a so-called "valuation of assets" which went on until September, 1957 (Defendant's Brief; 145, 180-181): The principal accomplishments of this valuation were the write-up of the channel account and the write-down in depreciation referred to *supra* pp. 61-62.

At the time of the transfer of the Canal to defendant nothing was said about any valuation of assets. "The Panama Canal," the unincorporated agency, kept complete

* At the hearings which preceded the Act of 1950 officers of shipping industry trade associations urged that the Canal's national defense value be recognized by not requiring defendant to pay interest. Appendix I, 48a; cf. R. 122. Congress recognized that argument only to the extent that it excluded from the capital base interest paid during construction. Section 412(e). Undoubtedly Sections 246(c) and 412(e) control in this litigation.

books. The actual transfer was deferred by the President nine months after the passage of the Act of 1950 so that the necessary paper work preliminary to the transfer could be done (Appendix F, 26a). No reason appears why Section 246(b) could not have been complied with. The United States Government appears to have undertaken at Panama the kind of write-up it has, with the approval of this Court, condemned when done by others who had a duty to charge reasonable rates, *United States* v. *New York Telephone Co.*, 326 U. S. 638.*

To add insult to injury, defendant argued that this valuation of assets excused its failure to prescribe tolls as commanded by Section 412(b) (R. 193, 249). The argument has not been repeated in this Court, perhaps because the valuation was completed in September, 1957.

The large and unexplained increase in administrative expense. One of the most mystifying features of defendant's "ambiguous bookkeeping" is its treatment of administrative expense. For years before July 1, 1951 the general and administrative expenses in the Canal Zone had been allocated between The Panama Canal and the Panama Railroad Company (the New York company) and defendant without visible difficulty.

For fiscal 1952 defendant's report allocated to Canal operation $697,757 of aggregate "General and administrative expenses" amounting to $2,772,634 (R. 25).

For fiscal 1953 the corresponding figures were $660,932 and $2,745,327, respectively (R. 27).

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* An examination of uniform systems of accounts prescribed by federal regulatory agencies indicates that such write-ups are invariably forbidden. Federal Communications Commission (telephone companies) Regs. 31.100; 31.2-21; Interstate Commerce Commission (railroad companies) Regs. 10.733; (inland and coastal water carriers) Regs. 324.1-151; (motor carriers) Regs. 182.01-20.

In fiscal 1954 defendant wrote up its capital account by reversal of the channel entries and reduction in accumulated depreciation. That year it also radically revised its treatment of general and administrative expense. *The item leapt from $2,745,327 to $4,957,714 and no allocation whatever was shown* (R. 30).

Taking this treatment of general and administrative expense together with the capital account write-ups and the disregard and withholding of General Counsel's opinion, *supra* p. 40, all of which occurred in fiscal 1954, the conclusion is forced that during that year defendant made a conscious decision to avoid compliance with the formula defined by Congress and to manipulate its books to that end.

Apparently one device in that effort was to reclassify as general various expenses of the business activities which had previously been treated as direct. This conclusion is supported by an examination of Table 7, "Administrative and Other General Expense" in defendant's 1956 report, p. 50. This table is replete with items such as "Unrecovered costs of railroad operations," "Unrecovered costs of steamship line," etc., that have no relation to the administration of the Canal, and appear to be direct expenses of the business activities.

The unexplained reversal in the operating results of the business activities. One deplorable feature of defendant's "ambiguous bookkeeping" is that it hides the reversal in the operating results of the business activities—the remarkable change from profit to loss.

Prior to 1951 the business activities not only paid their administrative expenses fully, but also paid dividends of $23,994,905 to the U. S. Treasury (R. 69).* For fiscal 1951,

* However, defendant, citing R. 110, states the amount of the dividends to have been $38,000,000 (Brief, 11). In any event they were large.

the last year before the transfer, defendant's budget program explicitly shows its expectation that it will earn its administrative expense and make a profit (Appendix E, 23a-25a), and subsequently it reported that it had done so.

The statement is also true of the business activities of The Panama Canal. In his 1949 report the Governor said (p. 28):

> "Business operations of The Panama Canal are conducted separately from operating activities pertaining directly to the transiting of vessels and the government and sanitation of the Canal Zone . . . It is the aim to operate the business activities as a whole on a self-supporting basis and, in general, to include as a charge against their operations 3 per cent interest on the net investment . . . The net revenue of $1,006,959.04 fell short by $125,962.76 of meeting this capital charge."

[The report for 1949 was the last available at the time the bill that became the Act of 1950 was under consideration. Also, on January 31, 1950, pursuant to the Act of August 12, 1949, many of The Panama Canal's business activities were transferred to defendant (R. 19-20).]

What the cause may be for this sudden switch from profit to loss can not be understood from defendant's reports. It is clear, however, that some radical change has affected the business activities, that this change has been concealed by its bookkeeping and that the resultant losses have been loaded on tolls.

Defendant, by its "ambiguous bookkeeping" and by charging its business activities losses to tolls, has frustrated the intent of the Government Corporation Control Act that controversial activities be closely scrutinized by Congress. As already noted, defendant's budget programs, *supra* p. 60, fail to comply with 31 U. S. C. §847, requir-

ing Government corporations to submit "estimates of operation by major types of activities."

Some of defendant's activities and methods of operation are highly controversial. The General Accounting Office has been sharply critical of its activities. Its 1953 report condemned the shipping line in many respects (pp. 50-52). Its 1955 report charged defendant with inefficient management, as noted by the Court of Appeals (R. 240; Report, 34-36); cf. also *supra* p. 21. The Subcommittee on Transportation of the Committee on Business Organization for the Department of Defense of the Commission on Organization of the Executive Branch of the Government (i.e., the "Hoover" Commission) made special studies reaching highly adverse conclusions respecting both the railroad and the shipping line (Report, 319-336; 337-362). The Commission had this to say (Report on Transportation, 80):

> "Despite the semblance of civilian leadership provided by the corporate structure, the Company is completely dominated by the military personnel. The *duplication of functions and wasteful management* arise from this inner conflict."

It is our purpose here not to analyze the usefulness and efficiency of defendant's business activities, but to show the validity of the Court of Appeals finding that defendant's practices are causing the very evils "the Government Corporation Control Act and the 1950 amendments to the Panama Canal Act were designed to prevent" (R. 249).

POINT IV.

The duty to prescribe tolls in accordance with the Section 412 formula took effect upon the transfer of the Canal to defendant on July 1, 1951 and not at defendant's pleasure.

The District Judge summed up his views on the subject as follows (R. 217):

> "It is my conclusion that the statute did not compel prescription of tolls under the statutory formula as long as defendant was *content* with the then prevailing tolls".

Not argued by defendant. The theory that the timing of tolls prescription was a matter of defendant's *pleasure* was introduced by the District Judge on his own initiative. As is evident from Mr. Colby's affidavit (R. 186), defendant maintained in the District Court that it was a matter of defendant's *discretion,* and that its discretion had not been abused. In the Court of Appeals defendant adopted the District Judge's "discussion" of the problem, but its principal argument on this phase of the case continued to be that it had not abused its discretion.

Hence the references in Section I "Meaning of the 1950 Statute" of the Court of Appeals opinion to the "defendant views", "defendant next points to", "defendant draws us to", etc. are somewhat misleading (R. 240-245). It was the District Judge who conceived these arguments; the defendant itself, except in the sense that it expressed approval of the "discussion" by the District Judge, has never made them.

1. THE LEGISLATIVE HISTORY SHOWS THAT CONGRESS INTENDED TO ADOPT A NEW TOLLS POLICY, NOT TO PROVIDE DEFENDANT WITH AN ALTERNATIVE POLICY TO PUT INTO EFFECT AT ITS PLEASURE.

The legislative history of the Act of 1950 has already been reviewed under Point I to show that Congress intended that tolls be based on Canal operations only, and without regard to the business activities. Here we shall review that history to show that Congress intended to establish policy as stated in the heading above. Unfortunately a certain amount of repetition is unavoidable.

It will be recalled that after the President had announced an increased rate the House of Representatives adopted House Resolution 44 authorizing a study "with particular reference to the proper accounting and allocation of costs attributable to" Canal transits, military activities, civil government and defendant's business operations, *supra* p. 35. The preamble of this resolution recited that (Appendix I, 40a):

> "Whereas, it is the responsibility of the Congress of the United States to establish the policy to be followed in prescribing the tolls that shall be levied for the use of the Panama Canal . . ."

A subcommittee of that Committee recommended that the President cause a study to be made of the organizational aspects of the Canal and meanwhile postpone the increase in the toll rate (Report No. 1304, 81st Cong. 1st Sess.).

The subcommittee's report, an excerpt from which is printed as Appendix I, b, 41a-44a, shows that it considered tolls policy as its subject. The reason that the subcommittee gave for its request for an organizational study was that, "The appropriate toll policy can hardly be decided upon

and administered without business type accounts, similar to those of public utilities, upon which to rely for the basic financial and operating data." Appendix I, 43a. The accounts of The Panama Canal, an unincorporated agency, did not provide such data, the subcommittee noted at p. 44a.

The ensuing study by the Bureau of the Budget contained a section entitled "Tolls Policy" (R. 91-94).

Inter alia the study stated (R. 102):

> "Provided that there is agreement as to the formula [i.e., policy] for establishing the tolls rates and adequate business-type accounts and financial reporting, the actual setting of the tolls rate becomes almost a ministerial function which could well be delegated to the corporation's board of directors."

Thus the Bureau saw defendant's rate-fixing as the exercise of "almost a ministerial function," and not as a matter of consent.

Following the budget study, H. R. 8677 was introduced to carry out its recommendations. In so far as Sections 411 and 412 are concerned the bill employed the precise language eventually adopted by the Act of September 26, 1950, except that a sentence limiting tolls to $1 per ton was struck from the bill by the Senate Armed Services Committee.

H. R. 8677 was the subject of substantially similar hearings and reports both by the Senate Armed Services Committee and the House Merchant Marine Committee. The hearing and report by the Senate Armed Services Committee comprise Exhibit D and are quoted almost *in extenso* in the Record (R. 104-169).

The Armed Services report asserted that the purpose of the bill was to improve the organization of the Panama Canal and to establish an equitable and proper base for

the "collection of tolls". The report continued: "Tolls will be calculated in accordance with a formula written into the law .... *The toll rate will, of course, be affected by any future changes in operating costs, interest rates, and Canal traffic and may be revised up or down*" (R. 167).

The House Merchant Marine report said in part (Appendix C, 15a-17a):

> "The recommendations contemplate . . . (c) that tolls for commercial ships *should be related to transit costs*, including interest on Government investment in the Canal and a fair share of the net cost of health, sanitation, and civil government .... Your committee believes that *legislation* reorganizing the Panama Canal and *establishing tolls policy* has long been needed".

At the committee hearings all who participated understood the bill to require defendant to prescribe tolls in accordance with the formula therein provided as soon as the transfer to defendant was accomplished.

Thus, Mr. Seidman of the Bureau of the Budget said the bill provided that defendant "*shall prescribe* the toll rates in accordance with a *formula.*" Armed Services Hearing (R. 108). Mr. Seidman also spoke of the bill as "*requiring* that—'tolls shall be prescribed at a rate * * *' " (R. 110). Mr. Shackelford, Counselor of the Army, referred to the bill as "*requiring* tolls to be—'prescribed at a rate * * *' " (R. 114). Mr. Ball, representing the Association of American Ship Owners, said that the bill "would *require* that tolls be fixed at a rate calculated to cover * * *" (R. 117). Mr. Burdick, of the Office of the Panama Canal, said that "the tolls rate * * * *will be set* high enough to pay about half" of the cost of the Canal Zone Government. "The other half *will be paid* by these business divisions" (R. 134). Mr. Prince, representing the Association

of American Railroads, spoke of "the *requirement* * * * that tolls be prescribed at a rate calculated to cover * * *" (R. 140). Mr. Bailey, representing the National Federation of Shipping, said that, "Under the bill * * * tolls for commercial ships would be related to transit costs * * *" (R. 146).

Mr. Seidman and other witnesses also explained that the "business activities" would bear their share of overhead charges. Thus, Mr. Seidman said that "* * * each of these business operations, any business has to carry its share of the interest, too, in proportion to the investment" (R. 128). Mr. Burdick, of the office of the Panama Canal, said that tolls would pay "about half" of the cost of "civil government." "The other half will be paid by these business divisions" (R. 134). These views were repeated in the Armed Services Report (R. 166).

Thus Congress understood and intended that the defendant's other activities would bear their proper share of general expenses, a purpose frustrated if, as has happened, defendant can, by keeping the 90¢ rate, pay those expenses from tolls.

Also inconsistent with the theory that defendant could keep the 90¢ rate at its pleasure is the elimination by the Armed Services Committee of the provision for $1 per ton maximum, an elimination approved by the Senate and acquiesced in by the House. In explanation of the deletion, the Armed Services report said (R. 165):

> "The House wrote in an amendment which would have placed a limit of $1 per net vessel-ton on the rate of tolls which could be charged. Such a limitation is entirely inconsistent with the principles of this legislation, *since the bill establishes a method of calculating tolls* at such a level as will make the

> Panama Canal self-supporting. The institution of an arbitrary ceiling could quite readily result in the Canal being forced to operate at a loss."

In other words, the bill embodied a tolls policy expressed by a formula. And if it was "entirely inconsistent" that there be a ceiling, it would be equally inconsistent that there be a floor imposed at defendant's pleasure.

Also inconsistent with the "content" theory, the legislative history shows that Congress anticipated that its formula rate might result in lower tolls. The legislative history shows that Congress anticipated that under the statute tolls would be governed by the operation of the formula, and, if the formula spelled lower tolls, then the rate would go down.

Thus the Armed Services Report said (R. 167):

> "The toll rate will, of course, be affected by any future changes in operating costs, interest rates, and *Canal traffic* and *may be revised either up or down.*"

The Bureau of the Budget study recommended with respect to tolls that ". . . *the rate should be adjusted periodically as changes take place in the factors* that determine the charges that should be made for the use of the Canal" (R. 102).

And the study quoted as follows from the 1937 special committee (R. 102):

> "Economic and commercial conditions are not static . . . The charges for the service should receive such adjustments from time to time as will keep the charges in harmony with the needs of the Canal and the requirements that must be met in making the Canal the servant and assistant of international intercourse."

Moreover the study criticized the existing statute on the ground that it did "not lend itself to the ready adjustment of rates, *either up or down*, to reflect increases or decreases in costs or changes in commercial conditions" (R. 102).

Summarizing: The legislative history demonstrates conclusively that Congress understood that the bill provided a new tolls policy which would take effect if the bill were adopted; that the policy related tolls to costs and that tolls would be periodically adjusted to reflect changes in costs and revenues.

There is not a word in the legislative history to suggest that a rate higher than the formula rate could be kept by defendant at its pleasure.

2. (a) AS A MATTER OF LANGUAGE, AND ESPECIALLY AS COMPARED WITH THEIR PREVIOUS WORDING, SECTIONS 411 AND 412 AS AMENDED BY THE ACT OF SEPTEMBER 26, 1950 SHOW THAT SECTION 411 WAS INTENDED TO DESIGNATE THE TOLLS-FIXING AUTHORITY AND SECTION 412 TO REQUIRE THAT TOLLS BE FIXED ACCORDING TO THE FORMULA THEREIN PROVIDED, EFFECTIVE, ACCORDING TO SECTION 14 OF THE ACT, ON THE DAY OF TRANSFER.

This proposition is demonstrated the more clearly by an examination of Sections 411 and 412 in comparative print form, in which matter omitted from existing law is indicated by brackets, and new matter by italics. A comparative print was annexed to the Armed Services report (R. 167-169).

We have also, in order to show the mandatory nature of Section 412, underlined the word "shall" wherever it appears therein.

The comparative print form, with the underlineations to which we have referred, follows:

"CHAPTER 23 — TOLLS FOR USE OF CANAL

"411. AUTHORITY [OF PRESIDENT] TO PRESCRIBE [AND CHANGE] MEASUREMENT—RULES AND TOLLS.—

The [President] *Panama Canal Company* is authorized [subject to the provisions of the section next following] to prescribe and from time to time change (1) *the rules for the measurement of vessels for the Panama Canal, and (2), subject to the provisions of the section next following,* the tolls that shall be levied [by the Government of the United States] for the use of the Panama Canal [, but no tolls when prescribed as above shall be changed unless six months' notice is given by the President by proclamation.]: *Provided, however, That the rules of measurement, and the rates of tolls, prevailing on the effective date of this amended section shall continue in effect until changed as provided in this section: Provided further, That the said corporation shall give six months' notice, by publication in the Federal Register, of any and all proposed changes in basic rules of measurement and of any and all proposed changes in rates of tolls, during which period a public hearing shall be conducted: And provided further, That changes in basic rules of measurement and changes in rates of tolls shall be subject to, and shall take effect upon, the approval of the President of the United States, whose action in such matter shall be final and conclusive.*

"412. BASES OF TOLLS [; MAXIMUM AND MINIMUM RATES].—(a) Tolls on merchant vessels, army and navy transports, colliers, *tankers,* hospital ships, supply ships and yachts *shall** be based on net vessel-tons of one hundred cubic feet each of actual earning capacity determined in accordance with the [Rules] *rules* for the [Measurement] *measurement* of [Vessels] *vessels* for the Panama Canal, [prescribed by

* Underlineation by plaintiffs.

the President and as may be modified by him from time to time by proclamation,] and tolls on other floating craft *shall** be based on displacement tonnage. [Provided, That the basic rules of measurement shall not be changed except after public hearing and six months' public notice of such change. The rate of tolls on laden vessels shall not exceed $1, nor be less than $0.75 per net vessel-ton as determined under the aforesaid rules, and] *The rate of tolls* on vessels in ballast without passengers or cargo [the rate] may be less than the rate of tolls for vessels with passengers or cargo. [In addition to the tolls based on measurement or displacement tonnage, tolls may be levied on passengers at rates not to exceed $1.50 for each passenger.]

"(b) *Tolls shall** *be prescribed at a rate or rates calculated to cover, as nearly as practicable, all costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto, including interest and depreciation, and an appropriate share of the net costs of operation of the agency known as the Canal Zone Government. In the determination of such appropriate share, substantial weight shall** *be given to the ratio of the estimated gross revenues from tolls to the estimated total gross revenues of the said corporation exclusive of the cost of commodities resold, and exclusive of revenues arising from transactions within the said corporation or from transactions with the Canal Zone Government.*

"(c) *Vessels operated by the United States, including warships, naval tenders, colliers, tankers, transports, hospital ships, and other vessels owned or chartered by the United States for transporting troops or supplies, may in the discretion of the President of the United States be required to pay*

* Underlineation by plaintiffs.

tolls. In the event, however, that such vessels are not required to pay tolls, the tolls thereon shall nevertheless be computed and the amounts thereof shall* be treated as revenues of the Panama Canal Company for the purpose of prescribing the rates of tolls, and shall* be offset against the obligations of the said corporation under paragraphs (c) and (e) of section 246 of this title, as amended.*

"(d) The levy of tolls is subject to the provisions of *section I of article III of the treaty between the United States of America and Great Britain concluded on November 18, 1901,* of *article* XVIII *and* XIX of the convention between the United States of America and the Republic of Panama [entered into] *concluded on* November 18, 1903, and of article I of the treaty between the United States of America and the Republic of Columbia proclaimed on March 30, 1922.

"(e) Capital investment for interest purposes *shall** not include any interest during construction."

Also relevant are:

Section 14 of the Act of September 26, 1950 providing that, with an exception immaterial here, the Act *"shall take effect upon the effective date of the transfer to the corporation * * * of the Panama Canal * * *"*. This date proved to be July 1, 1951 (Executive Order No. 10263, published at 16 F. R. 6333).

Article III, Section I of the Hay-Pauncefote Treaty, incorporated by reference in subsection (d), and providing that tolls shall be "just and equitable", has been quoted *supra* pp. 10-11.

* Underlineation by plaintiffs.

When Sections 411 and 412 as enacted in 1950 are compared with their prior form, any doubt as to their purpose disappears.

Previously Section 411 had designated the President as the tolls-fixing authority and defined the tolls-fixing procedure. Section 412 had provided the basis on which he should prescribe tolls, *i.e.*, between 75¢ and $1 per laden ton.

By the Act of September 26, 1950 Section 411 was amended so as to designate defendant as the tolls-fixing authority and to define the tolls-fixing procedure. Section 412 was amended so as to provide the new basis for tolls.

Now Section 412 made several provisions concerning tolls. In each subsection, except subsection (d), and in every new subsection, Congress used the word "shall" a word held by this Court to be "mandatory", "the language of command", *United States* v. *Thoman,* 156 U. S. 353, 360; *Escoe* v. *Zerbst,* 295 U. S. 490, 493; *Anderson* v. *Yungkau,* 329 U. S. 482, 485.

Thus by subsection (a) tolls "*shall* be based on net vessel-tons" etc.

By subsection (b) tolls "*shall* be prescribed at a rate" etc.

By subsection (c) toll credits for government ships "*shall* be treated as revenues of the Panama Canal Company", etc.

By subsection (e) capital interest purposes "*shall* not include any interest during construction".

Thus the Act of September 26, 1950, like its predecessors, used Section 411 to identify the tolls-fixing authority and define its procedure, and Section 412 to say how that authority should be exercised. The relationship between the two sections was made explicit by the provision that the authority was "subject to the provisions of Section 412".

Now, as already noted, Section 14 of the Act provided that it should become effective when the Canal was transferred to defendant, an event that occurred on July 1, 1951.

Can anyone doubt that Congress intended that all these mandatory provisions of Section 412 should become effective on that day?

And defendant has treated subsections (a), (c) and (e) as effective. In particular its bookkeeping has at all times treated as effective subsection (c), providing for tolls on Government ships, and subsection (e), providing that capital investment for interest purposes should not include interest during construction. The whole purpose of these subsections was for use in tolls prescription under subsection (b). They make no sense except for tolls prescribing purposes under subsection (b).

Defendant has sought, unsuccessfully, to persuade Congress to repeal subsection (e). But if the subsections of Section 412 took effect only at defendant's pleasure, why seek repeal? Why not simply ignore subsection (e)? And if these other subsections of Section 412 become effective on July 1, 1951, how does it happen that subsection (b) did not also then become effective?

And if subsection (b) did become effective on July 1, 1951 there can be no doubt that defendant then and there became subject to a duty to prescribe tolls, for subsection (b) uses the unquestionably mandatory word "shall".

(b) The District Judge Erred, Plaintiffs Submit, In His View That The Statute Did Not Require, But Merely Authorized, The Prescription of Tolls According To The Formula.

Plaintiffs rely primarly on Section 412. The District Judge misconceived plaintiffs' argument; he apparently thought that plaintiffs based their claim of duty under

Section 411, a somewhat baffling misapprehension as plaintiffs were most explicit in their reliance on Section 412(b) as the primary expression of defendant's *duty* to act (R. 13-14).

The District Judge misread the legislative history, plaintiffs submit. The District Judge relied for his theory that the statute provides merely for permission to defendant to use the formula, as distinguished from a duty to use it, upon four statements given before the Congressional committees and quoted in his footnotes 18a and 20a (R. 222-223).

In these statements witnesses refer to the unquestioned fact that Section 411 grants the tolls-fixing authority to defendant. But such grant is in no sense inconsistent with a duty to exercise the authority thus granted. Indeed it has often been held that the mere grant of authority, in matters of private right, required its exercise.* But in this case there was added the affirmative imposition of a duty—Section 412 (b).

One of these statements cited by the District Judge also suggests that if defendant failed to act, Congress, acting through its Appropriation Committees, would force it to do so. But in this aspect the statement indicates that the witness construed the statute as imposing a duty—otherwise there would be no occasion for Congressional compulsion.

Moreover, the District Judge's conclusion was, plaintiffs believe, inconsistent with his own assertion that Congress "hoped that the statute would establish a permanent tolls policy" and the citations supporting that assertion in his footnote 9 (R. 216-217).

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* *Supervisors* v. *United States*, 4 Wall. 435, 445-447; *U. S. Sugar Equalization Board* v. *P. De Ronde & Co.*, 7 F. 2d 981, 985-986.

The District Judge was also in error, plaintiffs submit, in saying that the Act of September 26, 1950 was "precipitated by the belief that an increase in tolls was necessary". As we have already shown, the original factor was the demand of the Governor of The Panama Canal for an increased toll, but the actual precipitation of the Act was the belief that there should be a proper allocation of costs between the various governmental activities in the Zone as evidenced by House Resolution 44 (Appendix I, 40a-41a). The President could have increased tolls without new legislation.

The transposition of the clause "subject to the provisions of the section next following" confirms that the tolls authority of Section 411 is subject to the mandates of Section 412. The District Judge made some point of the fact that the clause "subject to the provisions of the section next following" is put after "change" in the amended Section 411, whereas previously that clause appeared after the word "authorized" (R. 218-219). But, as an examination of the Act of September 26, 1950 in comparative print form will readily show, the reason for the transposition was that the draftsman wished to include authority over rules of measurement in Section 411 rather than in Section 412 in which it was then found.

Indeed, the transposition strengthens our point that the grant of tolls authority in 411 was subject to the mandatory "shall" of 412. For the grant of authority over measurement rules is not subject to 412; in other words, as to the rules, defendant had discretion, but as to tolls, it was required to carry out the policy embodied in the following section.

The transposition also shows that 411 was intended to identify authority and not to enact policy. The Act of 1937 had been somewhat inconsistent in this respect; the Presi-

dent's authority over tolls was provided by 411, but that over rules of measurement by 412. The Act of 1950 identified authority over both matters in 411.

The President was not permitted to exercise his tolls-fixing authority at his pleasure. The District Judge found support for his conclusion that defendant was under no duty to prescribe a new toll so long as it was "content" with the existing rate in the fact that the language of Section 411 as amended by the Act of September 26, 1950 "is identical with the language formerly authorizing the fixing of tolls by the President, whose power was indisputably discretionary" (R. 218).

If we understand the District Judge correctly we can only say that we profoundly disagree. Although exercise of the President's toll-fixing authority undoubtedly involved an element of discretion, as does defendant's, he was definitely under a duty to prescribe tolls within the statutory framework.

The original source of Sections 411 and 412 was Section 5 of the Panama Canal Act of 1912 (37 Stat. 560, 562-3). As amended by the Act of June 15, 1914, two months before the opening of the Canal, that Section read as follows:

> "That the President is hereby authorized to prescribe and from time to time change the tolls that shall be levied by the Government of the United States for the use of the Panama Canal. . . . When based upon net registered tonnage for ships of commerce the tolls shall not exceed $1.25 per net registered ton, nor be less than 75 cents per net registered ton. . . ."

Can anyone doubt that by this statute the President was directed to prescribe tolls in accordance with the policy provisions? Was it thought that, in the context, the word "authorized" was used in a permissive sense so that, by

not exercising his authority, the Canal could be made toll-free?

And, continuing the pattern right through the Act of September 26, 1950 we find the phrase "is authorized", first applying to the President and eventually to defendant as a designation of authority followed by policy provisions expressed by the word "shall" directing the exercise of that authority. The successive statutes prior to the Act of 1950 are collected in Appendix B, 10a-13a.

Certainly the Presidents have not conceived their authority as independent of the statutory policy provisions.

President Wilson regarded the tolls-exemption of U. S. coastwise shipping provided by the original Panama Canal Act as a violation of the Hay-Pauncefote Treaty. Together with Senator Elihu Root, he successfully led an agitation for its repeal.* Act of June 15, 1914; 38 Stat. 385. It was in the course of this controversy that Senator Root made the statement quoted *supra* p. 13, describing the status of the United States in the Canal Zone as that of the "mandatory for civilization."

As pointed out by the Court of Appeals at footnote 13 (R. 243), confusion over the statutory definition of tonnage led President Franklin D. Roosevelt in 1937 to appoint a committee to study the subject. The report of this committee recommended a revision of Section 412 to provide that tonnage should be determined in accordance with measurement rules. Senate Document No. 23, 75th Cong. 1st Sess. Congress adopted the recommendation by the Act of August 24, 1937, 50 Stat 750, amending Section 412

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* According to Baker: "It is not too much to say that Wilson's hard won victory not only placed the United States upon a new plane of honorable distinction among the nations, and increased international confidence and good feeling, but that it elevated world standards of diplomatic fair dealing" 4 Baker, *Woodrow Wilson*, 421-422.

accordingly and further providing that tolls should not exceed $1 per ton. President Roosevelt promulgated rules and revised tolls in accordance with the statute the day following its enactment, August 25, 1937. Federal Register, Year 1937, Volume 2, Part 2, pp. 1764-74, 1796.

Thus there are at least two occasions on which the President regarded the power granted by the "authorized" clause as controlled by the following policy language.

PART TWO.

Defendant having unlawfully withheld and unreasonably delayed the prescription of reduced tolls, the District Court may require it to prescribe tolls by mandatory injunction.

The discussion under this Part will assume that, as shown in Part One, defendant has improperly failed to respond to its duty under Section 412 to prescribe tolls in accordance with the formula there defined. This Part will establish that the District Court, under such circumstances, has the power and duty to require such prescription.

A central issue on this phase of the case is defendant's theory that the President's review power under Section 411 makes tolls a matter of executive policy rather than of executive administration of legislative policy. Defendant has predicated many arguments on this theory, which plaintiffs completely reject. We deal with this issue under Point IV. But under Point V we maintain that whatever may be the nature of the President's review power the courts may compel defendant to perform its statutory duty to prescribe tolls. In its anxiety to avoid compliance with the statute, defendant has brought forward many other arguments against jurisdiction some of which, in plaintiffs'

opinion, are rather desperate. We discuss its contentions under point headings as follows:

I. The District Court had jurisdiction over plaintiffs' claim under Title 28, Section 1331, United States Code.

II. Plaintiffs' claim may be enforced against defendant in its capacity as a corporation subject to suit, particularly in light of the legislative history of the Act of July 16, 1949, and, in its capacity as an agency of the United States, under both case law and the Administrative Procedure Act.

III. Statutes applicable to defendant, including statutes which confer functions upon the President and Congress respecting defendant's affairs, in no way "preclude" the assertion of plaintiffs' claim.

IV. The Section 411 proviso for the approval of the President means only that the President should himself "take Care" that defendant "faithfully executed" Section 412 in prescribing tolls. The proviso neither effected an "unlimited delegation" of tolls-making power, nor authorized the President to consider non-statutory factors, nor constituted defendant a mere adviser. The legislative history, the statutory background, the language and arrangement of the statute, the law of rate-making, the character of the non-statutory factors, anomalous and violative of the Hay-Pauncefote Treaty, which the defendant proposes that the President consider, and the Constitution unite to require this construction. The premise upon which defendant argues that it may not be compelled to act or to pay damages is therefore false. Nor was the approval requirement provided to protect the shipping industry.

V. Whatever may be the power of the President and whatever plaintiffs' rights of judicial review of tolls determinations, when made, defendant may be compelled to prescribe tolls. Corporations and agencies may be compelled to act, although their action, when taken, is not subject to judicial review, or for any reason may never become effective. Administrative procedures of which the final outcome is Presidential action not subject to judicial review are not exempt.

VI. Defendant's various distinctions and excuses, that the statute is not "peradventure clear," that rate-making is discretionary, that defendant has been thinking about the

toll rate, that to apply the statute would cause a deficit which Congress did not expect, etc., are invalid because of faulty reasoning and false premises.

VII. Plaintiffs had standing to sue. By Article III, Section I of the Hay-Pauncefote Treaty, incorporated in municipal law by the Act of 1950, plaintiffs' ships were guaranteed freedom of navigation through the Panama Canal at reasonable rates. *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, and *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, do not apply.

VIII. District courts other than the District Court for the District of Columbia have power to grant mandatory injunctions.

IX. It was orderly procedure for the Court of Appeals to direct the entry of summary judgment.

X. If and to the extent that the order of the President should embody an error of law, it is subject to judicial review. The Canal Zone Code, taken together with the Administrative Procedure Act, differs from the Tariff Act and the Civil Aeronautics Act. *Shaughnessy* v. *Pedreiro*, 349 U. S. 48, 51.

POINT I.

The District Court had jurisdiction over plaintiffs' claim under Title 28, Section 1331, United States Code.

This Section reads:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States".

The complaint was framed to invoke the jurisdiction of the Court under this statute and employs the phraseology suggested by Form (2)b of the Appendix to the Rules of Civil Procedure for such complaints.

It would seem self-evident that this action comes under 28 U. S. C. §1331.

The complaint states a claim under the laws of the United States. This Court has always construed the statute broadly. Its most recent extended discussion of the statute is in *Bell* v. *Hood,* 327 U. S. 678. The Court there held that it was the duty of the District Court to

> "look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States. For to that extent 'the party who brings a suit is master to decide what law he will rely upon and * * * does determine whether he will bring a "suit arising under" the * * * [Constitution or laws] of the United States by his declaration or bill.' The Fair *v.* Kohler Die Co., 228 U. S. 22, 25" (from p. 681).

The Court continued, at p. 682:

> "Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided *after and not before* the court has assumed jurisdiction over the controversy".

Much more could be written on this subject, but we refrain from doing so because the opinion in *Bell* v. *Hood* is so complete.

Defendant is a Government owned corporation incorporated under the laws of the United States. A second and sufficient reason for jurisdiction is the fact that defendant is incorporated under the laws of the United States and is a "wholly owned Government corporation" by specific declaration in the Government Corporation Control Act (31 U. S. C. §846).

Since the historic decision in *Osborn* v. *United States Bank*, 9 Wheat. 738, 816:

> "A suit by or against a corporation created under an Act of Congress is one arising under the laws of the United States".

The quotation is from *Federal Bank* v. *Mitchell*, 277 U. S. 213-4. The opinion in *Federal Bank* v. *Mitchell* discusses this subject fully and authoritatively and enables us to cut short this presentation.

By the Act of February 13, 1925, now 28 U. S. C. §1349, Congress provided that:

> "The district courts shall not have jurisdiction of any civil action by or against any corporation upon the ground that it was incorporated by or under an Act of Congress, unless the United States is the owner of more than one-half of its capital stock".

As defendant is wholly owned by the United States, §1349 does not serve to withdraw jurisdiction and confirms the jurisdiction held to exist by *Osborn* v. *United States Bank*.

THE COURT'S JURISDICTION WAS NOT LESSENED BY DEFENDANT'S STATUS AS AN AGENCY OF THE UNITED STATES.

In a brief largely devoted to the thesis that the District Court lacked jurisdiction, defendant does not, so far as plaintiffs can discover, cite a single case in which it was held that a district court lacked jurisdiction over a Government corporation sued on a claim arising under the laws of the United States.

Defendant's constant citation of cases involving unincorporated agencies and the Administrative Procedure Act seems to assume that because defendant is an agency its

suability is thereby lessened. But of course all Government corporations are agencies. In any event the precise argument was overruled in the World War I Emergency Fleet Corporation cases.

The Fleet Corporation was organized under the Act of September 7, 1916, 39 Stat. 728, to own and operate ships. Subsequently the Act of June 15, 1917, 40 Stat. 182, gave the President wide powers respecting ships and provided that, "The President may exercise the power and authority hereby vested in him . . . through such agency or agencies as he shall determine." The President designated the Fleet Corporation.

In *The Lake Monroe*, 250 U. S. 246, and *Sloan Shipyards v. U. S. Fleet Corporation*, 258 U. S. 549, this Court overruled the contention that its status as agent of the President conferred upon it any immunity whatsoever.

More recently in *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682, this Court, holding an agency not subject to suit on the facts of that case, twice distinguished *Sloan Shipyards* on the ground that it was a suit against a corporation. 337 U. S. 686, 702.

POINT II.

Plaintiffs' claim may be enforced against defendant in its capacity as a corporation subject to suit, particularly in light of the legislative history of the Act of July 16, 1949, and, in its capacity as an agency of the United States, under both case law and the Administrative Procedure Act.

(1) Defendant considered as a public corporation subject to suit.

(a) Defendant is subject to suit "in the same manner as any private corporation".

The Act of June 29, 1948, which created defendant, provided by Section 2, enacting Section 248, Title 2, Canal Zone Code, that defendant:

"(d) May sue and be sued in its corporate name".

That public corporations subject to suit have all the liabilities of private corporations, except as to execution, has been settled by numerous decisions of this Court. *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381; *F. H. A.* v. *Burr*, 309 U. S. 242; *R. F. C.* v. *Menihan Corp.*, 312 U. S. 81.

The 81st Congress, which enacted the Act of September 26, 1950, was well aware of defendant's liability to suit. That Congress, by Public Law 172, 1st Sess., took defendant out of the Federal Tort Claims Act at its own request. Defendant's President, in a letter to the Secretary of the Army, asserted that "since it is engaged in business as a common carrier and in other commercial enterprises the basic policies underlying governmental immunity from suit do not apply". (1949 U. S. Code Cong. Serv. 1593.)

Defendant's President in the same letter further noted that prior to the enactment of the Federal Tort Claims Act the corporation had been fully subject to suit.* Ibid. 1952.

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* Indeed defendant and its predecessor were most active litigants. Under "Table of Cases," Federal and Abbott's New York Digests list 28 lawsuits in which reported opinions were written and in which the Panama Railroad Company (the New York company) or defendant, during the three years that it bore the name Panama Railroad Company, was the plaintiff, appellant or petitioner. 68 Fed. Dig. 13; 68 Fed. Dig. Supp. 7; 40 (Part 2) Abb. N. Y. Dig. 257. Under "Defendant-Plaintiff Table," Federal and Abbott's New York Digests list 50 such lawsuits in which the Company or present defendant was the defendant, appellee or respondent—a total of 78 reported opinions. 70 Fed. Dig. 256; 70 Fed. Dig. Supp. 79; 41A Abb. N. Y. Dig. 317-318. This Court has written opinions in lawsuits of defendant or its predecessor at 166 U. S. 280, 249 U. S. 41, 252 U. S. 308, 264 U. S. 375, 266 U. S. 209, 271 U. S. 557, and 342 U. S. 29—a total of eight times.

The letter also fortified its request by pointing out that a series of statutes treated defendant as a private rather than a governmental operator, viz., the Suits in Admiralty Act, 46 U. S. C. §741, the Jones Act, 46 U. S. C. §688, the Longshoremen and Harbor Workers' Compensation Act, 33 U. S. C. §§901-950, and the Federal Employers' Liability Act, 45 U. S. C. §52. Ibid. 1590.

The Secretary of the Army transmitted the letter, with his approval, to the House Judiciary Committee (1949 U. S. Code Cong. Serv. 1593).

The House Judiciary Committee agreed. In reporting the bill, the Committee asserted that prior to the Federal Tort Claims Act, defendant was subject to suit "*in the same manner as any private corporation*". The Committee recommended that its former status be restored. House Report No. 830, U. S. Code Cong. Serv. 1590. Congress thereupon did so by Public Law 172, the Act of July 16, 1949, 63 Stat. 444, 28 U. S. C. §2680 (m), excepting defendant from the Federal Tort Claims Act.

A repercussion of Public Law 172 was before this Court in *Gardner* v. *Panama R. Co.*, 342 U. S. 29. This Court's opinion cites House Report No. 830 twice at 342 U. S. 32.

(b) A court of equity will compel a private person or corporation to perform a statutory duty.

We shall here argue the proposition stated above only very briefly. As we understand defendant's argument, it concedes that proposition as a general principle but maintains that because of the review power of the President, an alleged lack of standing to sue, the alleged special qualifications of defendant to interpret statutes and the fact that the suit is not in the District of Columbia, that proposition is not applicable in this case.

Illustrative of the judicial power to compel the performance of statutory duties is *Steele* v. *L. & N. R. Co.*, 323 U. S. 192. In that case the Court considered a suit by several Negroes against a collective bargaining agent to forbid discrimination against them in the agent's negotiations with the employer. The agent had been chosen and functioned under the Railway Labor Act. The Court construed the Act to require the agent to act without discrimination. The Court then addressed itself to the contention that the Act made no provision for judicial relief, and said at p. 207:

> "That right (that the agent act without discrimination) would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation and which it is their duty to give in cases in which they have jurisdiction. * * * We conclude that the duty which the statute imposes on a union representative of a craft to represent the interests of all its members stands on no different footing and that the statute contemplates resort to the usual judicial remedies of *injunction* and award of damages when appropriate for breach of that duty".

In the subsequent arguments to which we have referred we cite *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515, in which a railroad corporation was compelled to "treat with" a labor union, as required by statute; *Union Pacific Ry. Co.* v. *Hall*, 91 U. S. 343; in which a railroad corporation was compelled to operate its railroad as required by statute; *Brown* v. *Board of Education*, 349 U. S. 294, in which a municipal board was compelled to operate its schools according to law; and many others in which courts of equity have by injunctive relief, mandatory or prohibitory, compelled the performance of legal duty; cf. discussion of

power of district courts generally to issue mandatory injunctions, *infra* pp. 160-169, and cases there cited.

(2) *Defendant considered as an agency of the United States.*

Defendant was created by the Act of June 29, 1948, 62 Stat. 1075. Section 2 of that Act, enacting Section 245, Title 2, Canal Zone Code, declares defendant to be an "agency and instrumentality of the United States".

The Administrative Procedure Act defined and expanded the right of judicial review to compel agency action, a right which had existed under case law since earliest times. *Marbury* v. *Madison*, 1 Cranch, 137; *Kendall* v. *United States*, 12 Pet. 524; *Wilbur* v. *United States ex rel. Kadrie*, 281 U. S. 206, and many other cases.

By Section 10(a) of the Administrative Procedure Act (5 U. S. C. §§1000-1011) "any person suffering legal wrong because of agency action or adversely affected or aggrieved within the meaning of any relevant statute" is "entitled to judicial review". By Section 2(g) "agency action" is defined to include "failure to act".

By Section 10(b) "the form of proceeding" may be "any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction . . .) in any court of competent jurisdiction".

By Section 10(e) the court "shall (A) compel agency action unlawfully withheld or unreasonably delayed".

We do not understand that defendant denies that ordinarily a court may compel an agency to take action unlawfully withheld or unreasonably delayed, but claims that in this particular instance the general rule does not apply because of the approval power of the President, alleged lack of standing to sue, etc., contentions discussed *infra*.

POINT III.

Statutes applicable to defendant, including statutes which confer functions upon the President and Congress respecting defendant's affairs, in no way "preclude" the assertion of plaintiffs' claim.

Referring to Section 10 of the Administrative Procedure Act, defendant argues that "judicial review" is "precluded by statute". Brief, 44.

Plaintiffs contend, on the contrary, that relevant statutes not only do not preclude but positively invite judicial scrutiny of defendant's compliance with its duties. [As noted below, *infra* p. 122, plaintiffs draw a distinction between judicial compulsion of the performance of statutory duties and "judicial review."]

Although plaintiffs believe that judicial compulsion against defendant as an agency of the United States is warranted by the Administrative Procedure Act, their first assertion of jurisdiction is against defendant as a corporation subject to suit without qualification.

Nowhere does defendant even suggest that the courts could not enforce against a private corporation a duty such as that imposed by Section 412.

This Court has warned that, in "the present climate of opinion which has brought governmental immunity from suit into disfavor" and in the light of "expanding conceptions of public morality regarding governmental responsibility," consent to suit against Government corporations should be given "hospitable scope" and "interpolation(s)" should not be made in statutes which provide for suit "without qualification." *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381, 391, 396. This language has been in substance

reiterated in *F. H. A.* v. *Burr*, 309 U. S. 242, and in *R. F. C.* v. *Menihan Corp.*, 312 U. S. 81.

As we have seen *supra* pp. 90-91, the year before the Act of 1950 Congress modified the Federal Tort Claims Act so that defendant, a corporation with a long history of litigation, could be subject to suit "in the same manner as any private corporation" on its President's representation that "the basic policies underlying governmental immunity from suit [did] not apply [to it]."

Under these circumstances, if Congress intended to immunize a breach of statutory duty from judicial scrutiny it was exceedingly strange that it should impose that duty upon defendant.

Let us examine the statutes to which defendant points.

Public property and Section 4 of the Administrative Procedure Act. Defendant maintains, as evidence of preclusion, that it is its function to manage public property. But all Government corporations manage public property.

We have already referred *supra* pp. 88-89 to the Fleet Corporation cases in which this Court held that the status of a Government corporation as an agent of the President did not lessen its suability. *Sloan Shipyards* v. *U. S. Fleet Corporation*, 258 U. S. 549; *The Lake Monroe*, 250 U. S. 246.

Both of these cases concerned the possession of property.

To turn for the moment from considering defendant as a corporation to considering it as a Government agency:

That the subject matter is public property, if anything, advances plaintiffs' contention that judicial enforcement of defendant's statutory duty is appropriate. That the citizen is entitled to judicial enforcement of his statutory rights concerning public property has long been recognized.

An early decision by this Court respecting mandamus was the famous case of *Marbury* v. *Madison*, 1 Cranch, 137. Although that case did not concern public property, Chief

Justice Marshall, discussing the circumstances under which it would be *obvious* that a mandamus should be granted, chose for illustration a hypothetical case relating to the public lands, a case in which a citizen was entitled under a statute to a patent for lands "above the mouth of the Kentucky River", but the Secretary of State refused to give it to him. 1 Cranch, 165.

In the course of our nation's history the distribution of Government lands, especially in the West, made judicial enforcement of the citizen's rights respecting public property a most familiar subject of litigation in which the citizen's rights were repeatedly enforced against public officers. Later in this brief, in our demonstration that the citizen can enforce the performance by a Government agency of a statutory duty involving discretion, we shall cite cases respecting public lands. *Infra* pp. 124-125. Also, showing the judicial construction of the expression "subject to the approval of", we rely on cases respecting public lands. *Infra* pp. 109-111.

Section 4 of the Administrative Procedure Act. Defendant also refers to Section 4 of the Administrative Procedure Act, exempting agencies from rule-making procedures respecting "matters relating to agency management or personnel or to public property, loans, grants, benefits, or contracts".

This argument proves too much. Can it be seriously contended that Government corporations are exempted from suits respecting such "matters"?

Moreover, this statutory provision is in the Administrative Procedure Act itself. Assuming what we deny, that the Act can be applied to limit the suability of Government corporations, why not say so in those sections of the Act providing for judicial review if it were intended to limit

judicial scrutiny in these respects? Why put the limitation in Section 4 in such oblique fashion?

Further, it would be most anomalous that the Administrative Procedure Act, a statute intended to regularize and expand judicial review, should impliedly preclude a suability otherwise existing. Thus this Court noted in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 41, that "any exception we may find to [the Act's] applicability would tend to defeat this purpose". In *Heikkila* v. *Barber*, 345 U. S. 229, 232, the Court assured the bar that it would maintain "a judicial attitude of hospitality towards the claim that Section 10 *greatly* expanded the availability of judicial review". In *Shaughnessy* v. *Pedreiro*, 349 U. S. 48, the Court repeated that it would give an "hospitable" interpretation to the Act, stating that the purpose of Section 10 was to remove obstacles to judicial review of agency action (at p. 51).

The role of the President. Defendant maintains that Congress looked to the President to enforce defendant's duty to prescribe tolls (Brief, 49, 52, 56). The District Judge twice asserted that the President could compel defendant to prescribe tolls (R. 225, 230) and apparently deduced therefrom that it was not, in some measure and in this case, within the province of the courts to do so.

As the "executive Power" of the United States is "vested" in the President (Constitution, Article II, Section 1), as it is the President's duty "to take Care that the Laws be faithfully executed" (ibid. Section 3), and as the officers of the United States have tenure at his pleasure, *Myers* v. *United States*, 272 U. S. 52, the President is in a position to compel all officers and agencies of the executive branch to perform their duties.

Yet the authority of the courts to compel that performance is well-settled. The argument that the

President's power excluded that of the courts was definitively overruled in *Kendall* v. *United States,* 12 Pet. 524, in which a writ of mandamus was granted against the Postmaster-General. The Court said at pp. 612-13:

> "It was urged at the bar, that the postmaster general was alone subject to the direction and control of the President, with respect to the execution of the duty imposed upon him by this law; and this right of the President is claimed, as growing out of the obligation imposed upon him by the constitution, to take care that the laws be faithfully executed. This is a doctrine that cannot receive the sanction of this court. It would be vesting in the President a dispensing power, which has no countenance for its support in any part of the constitution; and is asserting a principle, which, if carried out in its results, to all cases falling within it, would be clothing the President with a power entirely to control the legislation of Congress, and paralyze the administration of justice."

It is, plaintiffs respectfully submit, unrealistic to think that the President will have the time to get after defendant. As Professor Rossiter has demonstrated in his work *The American Presidency,* the President today is Chief of State, Chief Executive, Leader of Foreign Policy, Commander-in-Chief of the Armed Forces, Chief Legislator, Chief of Party, Voice of the People, Protector of Peace, Manager of Prosperity and Leader of the World's Free Nations.

At R. 228, footnote 28, the District Judge quotes a passage from *Marbury* v. *Madison,* 1 Cranch, 137, 171, and italicizes two clauses which hold that the courts may compel an executive officer to do acts "in the performance of which he is not placed under the particular direction of the president, and the performance of which the president cannot lawfully forbid."

In this instance the defendant agency is distinctly *not* under the particular direction of the President; in fact defendant is considerably less under his direction than is usual in the executive branch. By Section 247 as amended by the Act of 1948 management of defendant is vested in a board of directors, who are appointed by the "stockholder". Under Section 246(a) the President appoints the stockholder. The President's control is thus a step removed, and there is nothing in the statute to suggest that the President's power of direction is other than general.

We have already, *supra* pp. 88-89, described the Fleet Corporation cases in which the Court held that the status of that Corporation as agent of the President did not lessen suability. *Sloan Shipyards* v. *U. S. Fleet Corporation*, 258 U. S. 549; *The Lake Monroe*, 250 U. S. 246.

The role of Congress. *The Government Corporation Control Act.* Defendant maintains that it is immune from suit because, it says (Brief, 49-53), financial affairs are regulated by Congress under the Government Corporation Control Act.

Again the argument proves too much. All wholly-owned Government Corporations are required to submit budget programs to Congress. Does this mean that they are all immune from suit with respect to estimated income?

31 U. S. C. §849 defines the purpose of the submission of budget programs and the effect of their approval. That purpose and effect are to make "available for *expenditure* for operating and administrative expenses such corporate" and appropriated moneys as Congress sees fit. Thus Congressional action on budget programs is an approval of expenditures, comparable to an appropriation—it does not purport to relate to income, let alone to immunize from judicial scrutiny the ways by which the various corporations get the income they have estimated.

If there could be any doubt on this score it would be removed by the language of the appropriation acts. Defendant cites these acts (Brief, 137) but significantly does not quote them.

In each of the acts cited by defendant the actual language was as follows:*

> "The following corporation [referring to defendant] is hereby authorized to make such expenditures, *within the limits of funds and borrowing authority available to it and in accord with law* . . . as may be necessary in carrying out the programs set forth in the Budget for the fiscal year" etc.

In short, what Congress said to defendant was in substance, "To the extent that you can get the money lawfully you can spend it as you propose".

The possibility of conflict with the courts. Defendant also conceives the possibility of a conflict between Congress and the courts, with Congress telling defendant to do one thing and the courts telling defendant to do another. Plaintiffs cannot take these fears seriously.

All that the Court of Appeals attempted to do was to enforce what it found to be the will of Congress as evidenced by the Act of 1950. If Congress is not satisfied with that finding, or believes that under present conditions some different arrangement should be made, there is nothing in the Court of Appeals decision to prevent it from enacting some new statute in other terms.

It is difficult to see how defendant's argument is not equally applicable to the judicial enforcement of any act of Congress. If it is valid, the courts could never enforce any statute.

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* Department of Commerce and Related Agencies Appropriations Acts for 1956, 1957 and 1958; 69 Stat. 235-237, 70 Stat. 322-324, 71 Stat. 78.

The inaction of Congress during the pendency of this case. Because Congress has not changed the statute during this case, defendant deduces that Congress approves its refusal to prescribe tolls. It might equally well be argued that Congress's inaction ratifies the construction of the statute by the Court of Appeals. Indeed that Court seemed to find support for its construction of the Act of 1950 in the failure of Congress to adopt the recommendation of the Comptroller General that the Act be amended to permit charging the losses of the business activities against tolls (R. 240).

The fact that the previous statute did not provide for judicial review. Defendant finds such preclusion in the fact that the "pre-existing statutory plan" precluded judicial review (Brief, 54-55).

When Congress enacted a statute by which the duty to prescribe tolls was transferred from the President to an agency of the United States that was also a corporation subject to suit without qualification, it must have taken for granted, in the light of the suability of Government corporations and the Administrative Procedure Act, that compliance with its statutory duty could be compelled by the courts. Cf. *supra* pp. 88-91, 93.

POINT IV.

The Section 411 proviso for the approval of the President means only that the President should himself "take Care" that defendant "faithfully executed" Section 412 in prescribing tolls. The proviso neither effected an "unlimited delegation" of tolls-making power, nor authorized the President to consider non-statutory factors nor constituted defendant a mere adviser. The legislative history, the statutory background, the language and arrangement of the statute, the law of rate-making, the character of the non-statutory factors, anomalous and violative of the Hay-Pauncefote Treaty, which the defendant proposes that the President consider, and the Constitution, unite to require this construction. The premise upon which defendant argues that it may not be compelled to act or to pay damages is therefore false. Nor was the approval requirement provided to protect the shipping industry.

Defendant has built its theory of the case on that clause of Section 411 providing that tolls prescribed by defendant shall be approved by the President. Defendant maintains, and persuaded the District Judge, that by this clause Congress made an "unlimited delegation" (R. 227) of its toll-making power to the President.

Thus, according to defendant, tolls-fixing is a matter of executive policy to be decided by the President in his absolute discretion. Defendant, we are told, is a mere adviser.

This claim by defendant poses a central issue in the case.

Plaintiffs maintain, on the contrary, that Congress determined policy by Section 412. Defendant was made the agent of Congress to carry out that policy; the President, in accordance with Article II, Section 3 of the Constitution, was designated to make sure that any toll fixed by defendant carried out that policy correctly.

Consequently Sections 411 and 412 bring into play the well-settled principles of judicial enforcement applicable to the administration of statutory policy by the executive branch and independent agencies. These principles are wholly contrary to defendant's theory that the tolls are a matter of executive policy authorizing the President to set tolls on "bases" other than those specified by statute.

Plaintiffs will demonstrate that by all criteria—legislative history, statutory background, the language and arrangement of the statute, the law of rate-making and the Constitution—the President's review power under Section 411 should be so construed.

A. The legislative history abounds with evidence that Congress intended by the Act of 1950 to establish policy, and did not intend to abdicate policy by the Section 411 proviso, which was barely mentioned.

B. The statutory background: Congress has always kept control of tolls policy.

C. The arrangement of the statute: Section 411 deals with procedure, Section 412 with policy.

D. The language of the statute: The words "subject to the approval of" ordinarily mean that the officer whose approval is required shall sanction the act of another according to law; the broader meaning given those words in *Chicago & Southern Airlines* reflects differences in both substance and procedure and not the fact that the President was the reviewing officer.

E. Under the law of rate-making, the rate-making authority executes a policy laid down by the Legislature.

F. The character of the non-statutory factors which defendant proposes that the President consider is anoma-

lous. For him to use the toll rate for purposes of domestic transportation policy and foreign policy would violate the nation's good faith and the Hay-Pauncefote Treaty.

G. To construe the Section 411 proviso as requiring the President to see to it that any toll prescribed by defendant conforms to law fits precisely with the Constitutional definition of his duty; if it is an "unlimited delegation", it is unconstitutional.

H. The review power was not provided to protect the American shipping industry.

A. The legislative history abounds with evidence that Congress intended by the Act of 1950 to establish policy, and did not intend to abdicate policy by the Section 411 proviso, which was barely mentioned. We have already reviewed the legislative history twice in Part One, first in Point I, to show that Congress intended that tolls be calculated on the basis of the Canal activity only, *supra* pp. 34-40, and again in Point IV, to show that Congress intended to adopt a new permanent policy to be put into effect at the time of the transfer of the Canal to defendant, and not at defendant's pleasure, *supra* pp. 69-74. The able and forceful review of the legislative history by the Court of Appeals at R. 245-249 also demonstrates the intent of Congress to establish policy. It would therefore be unnecessarily repetitive to review the legislative history again here.

Despite the constant references in House Resolution 44 and Committee reports and testimony to statutory tolls policy, defendant argues from the Presidential review clause in Section 411 that tolls are executive policy and the defendant a mere adviser.

This review clause was barely mentioned in the legislative history, as the Court of Appeals twice notes (R. 247, 248).

Defendant has culled out and quoted the two references in the legislative history to the President's review power (Brief, 55, 66-67). We find nothing in these references inconsistent with our theory of the review power. In both instances the Bureau of the Budget said, once directly, and once by its representative, Mr. Seidman, that the President's approval power was necessary because tolls were related to national transportation policy. In other words, it was because of the *importance* of tolls that review by the President was required. Neither the Bureau study nor Mr. Seidman made any suggestion that the President was at liberty to disregard the statutory tolls policy the Bureau itself proposed.

In one of these references Mr. Seidman spoke of the review power *and the public hearing* as "safeguards" (R. 109). Does this mean that the public hearing and therefore defendant itself may take into account non-statutory factors? Even the District Judge agreed that "new tolls, if they are prescribed, must conform with Section 412" (R. 217). Hearings are to make sure that a statute is properly carried out, *Morgan* v. *United States*, 298 U. S. 468, 479-480, and the purpose of the President's review power is the same.

Full appreciation of the assumption by all concerned in the formulation of the Act of 1950 that the statutory policy would govern tolls-fixing can only be gained, of course, by reading the full legislative history, an arduous task. However, the minutes of the last hearing, that before the Senate Armed Services Committee, forcefully convey that conclusion and are printed in the Record almost in full (R. 104-164). Possibly members of the Court may wish to glance through these minutes.

Perhaps of special significance is the fact that the final Committee reports (House, Appendix C, 14a-17a; Senate,

R. 164-167) both describe the bill as establishing tolls policy; the Senate report does not even refer to the President's review power. And the 1949 House Merchant Marine report recommending that the Bureau of the Budget study Panama Canal organization and tolls policy, referred to the then existing legislation as follows: "It is strange that the fixing of tolls should be the responsibility of the President" (Appendix I, 43a).

In its comment on this case the Harvard Law Review aptly summed up the legislative history as follows (71 HARV. L. REV. 544-545):

> "The time and effort devoted to perfecting the formula and the consideration given by the committees to proposals from various interested parties demonstrate that Congress was seeking a permanent and stable toll program."

How inconsistent that Congress should simultaneously make tolls a matter of executive policy with respect to which its formula should be merely a helpful hint to be disregarded by the President at his pleasure!

The true purpose of the proviso. The proviso merely states a power that the President has, in any event, under the Constitution, which he may exercise if he chooses. By Article II, Section 1 of the Constitution the "executive Power" is "vested in a President". By Section 3 it is the President's duty "to take care that the laws be faithfully executed". In *Myers* v. *United States*, 272 U. S. 52, the Court held that, by the necessary implication of these sections, a statute depriving the President of the power to remove officers of the United States at his pleasure was unconstitutional.

Undoubtedly, the purpose of the proviso was to make sure that the matter came to the attention of the President, not

to confer a power that did not otherwise exist. The administration of the Government is so gigantic and complex that the President cannot be expected personally to oversee every operation, as this Court observed in far simpler days more than a century ago, in *Williams* v. *United States*, 1 How. 290, 297. Hence special provision was necessary.

To be realistic, let us recall that the proviso was originally proposed by the Bureau of the Budget (R. 102), a body that has come to audit and correlate the performance of their functions by the executive departments. The proviso meant that before the rate went into effect the Bureau would have a look at it, circularize such interested departments as State, Commerce and Justice, and make sure that defendant's officers had not committed some error of law or economic prediction, a precaution probably deemed necessary because of the commercial and international aspects of defendant's tolls.

But this review power did not mean that the President, in exercising it, could disregard Congressional policy and substitute a different one of his own. This we have already shown respecting the legislative intent, and we shall further demonstrate the proposition by discussion of other criteria.

B. The statutory background: Congress has always kept control of tolls policy. Congress has at all times regulated tolls policy, although permitting the President a limited discretion within the framework of that policy. It would be most extraordinary that Congress, with this long tradition, should suddenly, and in the most offhand manner, abdicate that policy.

The successive statutes are the Act of August 24, 1912 (37 Stat. 560, 562-563), the Act of June 15, 1914 (38 Stat.

385-386), the Act of June 19, 1934 (48 Stat. 1122) and the Act of August 24, 1937 (50 Stat. 750); they are collected in Appendix B to this brief, pp. 10a-13a.

No President has ever regarded himself as the maker of tolls policy. On the contrary, both Presidents Wilson and Franklin D. Roosevelt, by recommending certain tolls policies to Congress, as described *supra* pp. 83-84, and awaiting the action of Congress, showed that they regarded Congress as the arbiter of tolls policy.

C. The arrangement of the statute: Section 411 deals with procedure, Section 412 with policy. The provision for the approval of the President is found in Section 411 dealing with procedure entitled "Authority to prescribe measurement rules and tolls", as distinguished from Section 412, dealing with policy, and entitled "Bases of tolls".

Thus Section 411 authorizes defendant to prescribe measurement rules and tolls, provides that those prevailing at the time of enactment shall be effective until changed, stipulates for six months' notice during which a public hearing is to be held, and requires the approval of the President.

Section 412 provides for a specific tonnage basis of tolls calculation, directs that tolls be prescribed so as to cover interests and costs of canal operation, requires toll credits for transits by Government ships, subjects tolls to Article 3, Section 1 of the Hay-Pauncefote Treaty, and forbids the inclusion of interest during construction in the interest calculation.

If it had been intended that the review power should affect policy, that power would have been provided in Section 412.

D. The language of the statute: The words "subject to the approval of" ordinarily mean that the officer whose

approval is required shall sanction the act of another according to law; the broader meaning given those words in *Chicago & Southern Airlines* reflects differences in both substance and procedure and not the fact that the President was the reviewing officer. Certainly the ordinary meaning of the word "approve" is that the approving person makes sure that he whose action is to be approved has acted rightly; it does not mean that the approving person is to do the thing himself if he doesn't like what has been done. The ordinary meaning is especially valid where he whose action is to be approved is required to act according to a defined procedure and standard.

As the Court said in *People* v. *Board of Education*, 258 Ill. App. 271 (1st Dist.), at p. 279, the phrase, "subject to the approval of" "negatives the idea" of "unlimited and uncontrolled power and authority".

The expression "subject to the approval of" has frequently been before this Court in cases involving the public lands.

In *Wisconsin R. Co.* v. *Price*, 133 U. S. 496, the Court held at p. 511 that the expression required the officer in question, the Secretary of the Interior, to make a "judicial" examination of the applicable law and facts.

In the frequently cited case of *Weyerhaeuser* v. *Hoyt*, 219 U. S. 380, the Court said at p. 388 that the grant of such authority "involved not only the power but implied the duty *to determine the lawfulness* of the" action subject to approval (land selections).

In *Stalker* v. *Oregon Short Line*, 225 U. S. 142, the Court considered a statute conferring a "right to take" subject to the approval of the Secretary of the Interior. The Court said at p. 148:

> "When, therefore, the railroad company has exercised its 'right to take' a particular tract for station

purposes, by filing a survey and plat of the ground selected, the Secretary of the Interior is *called upon to interpret the law under which the right to take is claimed, and to determine the lawfulness of the taking,* as of the time when the right was asserted by the filing of the plat and survey".

In *Payne* v. *New Mexico,* 255 U. S. 367, the Court, referring to the words "subject to the approval" etc., said at p. 371: "Their purpose is to *cast upon the Secretary the duty of ascertaining whether the selector is acting within the law,* in respect of both th land relinquished and the land selected, and of approving or rejecting the selection accordingly".

This Court has also declared what "subject to the approval of" does *not* mean.

In *Payne* v. *Central Pacific Ry. Co.,* 255 U. S. 228, the Court held that such authority did *not* "clothe" the designated officer with "discretion" "to substitute his judgment for the will of Congress as manifested in the granting act" (p. 236).

In *Daniels* v. *Wagner,* 237 U. S. 547, the Court sarcastically described the very argument now advanced by defendant as follows: "That although Congress may have the power to provide for the disposition of the public domain and fix the terms and conditions upon which the people may enjoy the right to purchase, it has not done so, since every command which it has expressed on this subject may be disregarded and every right which it has conferred on the citizen may be taken away by an unlimited and undefined discretion which is vested by law in the administrative officers appointed for the purpose of giving effect to the law" (p. 558).

Other characterizations of the review power have been made in *Northern Pacific Ry. Co.* v. *McComas,* 250

U. S. 387, 393 ("sound, but not arbitrary, discretion"), *Orchard* v. *Alexander,* 157 U. S. 372, 383 ("not arbitrary and unlimited"); *Cornelius* v. *Kessel,* 128 U. S. 456, 461 ("not an unlimited or an arbitrary power").

It is true that in *Chicago & Southern Airlines* v. *Waterman S. S. Corp.,* 333 U. S. 103, this Court gave a broader interpretation of that expression as found in 49 U. S. C. §601, but that was because of the different nature of the award of foreign route certificates to air carriers under the Civil Aeronautics Act from rate-making on openly published accounts.

These differences led this Court to conclude that the award of such certificates was, in respect of the function of the President, a matter of executive policy, and not a matter of the administration of legislative policy. But in reaching this conclusion the Court emphasized forcefully the exceptional nature of the statute and its subject matter. *The Court expressly distinguished cases relating to foreign commerce by land and water.* 333 U. S. 107. It would be extraordinary that a decision reached on the very ground of the peculiarities of that case should be made into a precedent overruling the body of law otherwise applicable in situations where those peculiarities did not exist.

Essentially the difference in subject-matter is this: Foreign route certificates for air carriers are a matter of international negotiation. Obviously our Government cannot confer landing rights in a foreign country. Accordingly by 49 U. S. C. §602 Congress has required the participation of the Department of State. Also, the President must be able to retaliate in the event foreign countries discriminate against this nation. Usually only one carrier can be selected. Moreover, "routes and bases should be prudently correlated with facilities and plans for our own national defenses." 333 U. S. 108.

The Civil Aeronautics Act specified certain standards which the Board should apply respecting foreign route certificates preliminary to the submission to the President. 49 U. S. C. §§481, 488. For that reason four members of this Court thought that the decision of the Board could be reviewed, although not that of the President. 333 U. S. 114-115. The majority, however, concluded that because of the requirement that the Board's decisions "shall be submitted to the President *before publication thereof*" (49 U. S. C. §601), the statute had not "contemplated interposition of the courts at this intermediate stage." 333 U. S. 112.

Thus it was on the basis of those features of *Chicago & Southern Airlines* strikingly different from this case as to substance and procedure that led the Court in that case to regard the President's action as a matter of executive policy rather than administration of legislative policy.

At R. 251-252 the Court of Appeals persuasively distinguished *Chicago & Southern Airlines*.

E. Under the law of rate-making, the rate-making authority executes a policy laid down by the Legislature. If the President was to apply the tolls policy of Section 412, then the statutory scheme conforms exactly to traditional rate-making procedures; otherwise, it defies them.

Rate-making has frequently been declared by this Court to be a legislative function. *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 226; *Keller* v. *Potomac Electric Co.*, 261 U. S. 428, 440-441; *United States* v. *Jones*, 336 U. S. 641, 652.

Article I, Section 1, of the Constitution vests "all legislative Power" in Congress.

The Panama Canal is government property and, of course, under Article IV, Section 3, it is Congress which

is granted power to "make all needful Rules and Regulations" respecting such property.

As is well known, legislative bodies do not ordinarily fix rates directly but enact a policy and confer power on some other authority to carry out that policy and fix specific rates.

This Court has said that in the exercise of its rate-making power Congress customarily lays down "an intelligible principle to which the person or body authorized to fix such rates is directed to conform". *Hampton & Co.* v. *United States,* 276 U. S. 394, 409. In that case the rate-fixing authority was the President.

In *Interstate Commerce Commission* v. *Goodrich Transit Co.,* 224 U. S. 194, this Court said at p. 214:

> "The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress."

In *Hampton & Co.,* a case relating to customs duties, the Court expressly found at p. 409 that there was no distinction between making interstate commerce rates and customs duties. Certainly no reason can be conceived why the principle should not also apply to proprietary rates, especially proprietary rates with respect to which the United States has an external obligation to make "just and equitable".

This Court in *United States* v. *Grimaud,* 220 U. S. 506, a leading case on administrative functions, also in the field of government property, adopted the same

reasoning as that of the rate cases. This Court said that Congress conferred upon executive officers the power to make regulations "not for the government of their departments, but for administering the laws which did govern" (220 U. S. 517); Congress "was merely conferring administrative functions on an agent, and not delegating to him legislative power" (220 U. S. 516).

F. The character of the non-statutory factors which defendant proposes that the President consider is anomalous. For him to use the toll rate for purposes of domestic transportation policy and foreign policy would violate the nation's good faith and the Hay-Pauncefote Treaty.

The District Judge conceived the Section 411 proviso as constituting an "unlimited delegation" of tolls-making power to the President. The District Judge, like defendant, regarded the statutory prescription of tolls by defendant as mere information which the defendant was to pass on to the President who would fix tolls on the basis of "the needs of the national transportation policy", that is "the competitive balance between steamships and railroads", and on [the needs of] "foreign policy" (R. 227, 233).

Defendant seems to shrink from the expression "unlimited delegation" used by the District Judge to characterize the President's review power. Nevertheless, in explaining the non-statutory factors which, it says, the President may consider, the defendant gives illustrations in the fields of domestic transportation policy and foreign policy and in substance reaches the same result (Brief, 67-70).

Plaintiffs submit that these illustrations, which undoubtedly were the best the defendant could think of, are anomalous. If the President did act on them, he would violate our country's good faith and the Hay-Pauncefote Treaty.

One illustration is the possiblity that reduced tolls might result in a loss of business by the railroads (Brief, 68). Does the defendant seriously maintain that the foreign 70% of Canal traffic can be surcharged in order to bolster up a competing American transportation facility? A rate designed to gratify our notions of domestic transportation policy? Is this the attitude of the "mandatory of civilization"? Is this consistent with the fine assertions of Secretaries Clay, Cass and Blaine that the nation controlling the ship canal should take no selfish advantage? With the splendid declaration by President Cleveland that we had "in advance" "consecrated" the canal to "mankind"?

Not even the representative of the railroads (Mr. Prince), whose lengthy testimony before the Armed Services Committee is in the Record (R. 135-144), urged that such considerations were properly relevant to tolls. Indeed the railroad representative was so devoted to the cost-of-service principle that he urged "very sincerely" that the $1 ceiling in the bill as it passed the House be eliminated because "wholly inconsistent" with the bill's "theory and philosophy" (R. 142).

To pursue the analogy to Suez, is it the position of the United States Government that Egypt may raise tolls at Suez to protect the Egyptian railway system or for some comparable consideration, such as the protection of the pipeline Egypt is said by the public press to plan to build? Egypt has now merged with Syria. May the United Arab Republic adjust tolls at Suez to force an otherwise uneconomic use of the pipelines of Syria? To refer to the holding of the District Judge, does the President of the United Arab Republic have "unlimited" discretion to use Suez tolls for "the needs of foreign policy"? Acceptance of defendant's argument would require affirmative answers to these questions.

Defendant's other illustration is the possible diversion of traffic from Suez by reduced tolls. Similar questions present themselves. Are Suez tolls to be kept high in order to protect Panama? Do Panama and Suez constitute an international waterway combine in which each protects the other's rates? This idea is breathtaking. It is, we believe, without precedent in the considerable literature of these Canals.

Although these questions answer themselves and demonstrate the fallacy of defendant's argument, we cannot forbear comment on the impossibility that Congress could have intended consideration of the non-statutory factors proposed by defendant, which are, as we have said, unquestionably the most plausible that defendant could imagine.

As for the protection of the railroads:

In fact, the amount of dry cargo moving through the Canal, the only freight with respect to which there is rail-water intercoastal competition, has declined from 7,000,000 odd tons in 1939 to 4,000,000 odd in 1953, according to a study published in 1955 by the Maritime Administration entitled "A Review of the Coastwise and Intercoastal Shipping Trades" (pp. 22-23). A number of lines have been forced out of business. It is the intercoastal shipping lines that need relief if they are to continue to exist.

Defendant refers to the national transportation policy defined in the preamble to the Interstate Commerce Act as enacted by Section 1 of the Transportation Act of 1940, 54 Stat. 899 (Brief, 68). According to this preamble, it is the policy of Congress that "all modes of transportation" be so regulated "as to recognize and preserve the inherent advantages of each". If so much foreign traffic goes through the Canal that lower tolls will pay operating costs

and interest, that fact constitutes an "inherent advantage" which it is the policy of Congress to recognize.

It would be ironic if tolls were kept up for any consideration such as defendant proposes. The exemption of intercoastal traffic from tolls provided by the Act of 1912 was repealed because of the obligation to foreign traffic provided by the Hay-Pauncefote Treaty. *Supra* p. 83. Now foreign traffic is so great that tolls may be reduced and still pay cost of service and interest. Are the intercoastal lines now to be told that for the sake of the railroads they cannot have that reduction?

As to the protection of Suez:

The ordinary competition between the Canals is negligible, being confined to a small volume of traffic between Great Britain and Western Australia.

The sharp reductions in the Suez rate since 1948 noted *supra* p. 29 have not caused any loss in traffic at Panama; indeed the traffic has substantially increased. If the Panama rates were reduced 25¢, the annoying possibility envisaged by defendant, *the Panama rate would still be higher relative to the Suez rate than it was either in 1937, when the present Panama rate was fixed, or in 1948, when the agitation leading to the Act of 1950 began.*

During fiscal 1957 the Suez Canal was *entirely closed* for over six months, yet, according to defendant's own analysis, the resultant gain in gross revenues at Panama was less than 10% of the total for the year (defendant's report for 1957, p. 5).

Consideration of such factors would also, we submit, be inconsistent with Article III, Section 1, of the Hay-Pauncefote Treaty.

As the Court of Appeals succinctly noted: "The defendant's decisions are not complicated by factors of diplomacy

or national defense, *since the Hay-Pauncefote Treaty forbids use of the Canal toll rate as a weapon of foreign policy*" (R. 252). The Treaty also, plaintiffs submit, forbids its use for purposes of domestic policy.

To keep rates high because of the needs of the railroads would be discriminatory in favor of our national interest—assuming that such is our national interest. To keep them high for the sake of Suez would be discrimination in favor of the United Arab Republic.

Moreover such criteria are inconsistent with the "just and equitable" tolls provision. Throughout the entire history of the Canal it has been assumed that tolls should be based on cost. *Supra* pp. 45-46. There has been disagreement as to how cost should be calculated, with particular reference to the proper allocation of costs as between the Canal and national defense, the proper interest rate, etc. as evidenced in our reviews of the legislative history in Part One of this brief, but there never has been so far as plaintiffs can discover, any suggestions that any factor other than cost could properly be taken into account. Certainly defendant points to no such suggestion prior to this case. To make rates for the world on the basis of the competing facilities of our nation, or of those of some other nation, would not be "just and equitable."

Conceding that Congress, as a matter of domestic law, may repeal or modify a treaty, *Pigeon River Co.* v. *Cox*, 291 U. S. 138, 160; *Cook* v. *United States*, 288 U. S. 102, 120; *Head Money Cases*, 112 U. S. 580, 597-599, nevertheless a "treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed", *Cook* v. *United States*, at p. 120; cf. *Pigeon River*, at p. 160.

Here it is abundantly clear that no one in Congress intended that the Act of 1950 accomplish any repeal or

modification of the Hay-Pauncefote Treaty. On the contrary, by and for the first time, incorporating Article III, Section 1, in the laws of the United States, that is, in Section 412 (d), Congress showed its intent affirmatively to conform our municipal statute law to the Treaty and to define the "just and equitable" Treaty rate by the Section 412 formula.

This Court has declared itself "bound" to construe a "treaty liberally in favor of the rights claimed under it", *United States* v. *Payne*, 264 U. S. 446, 448-449; cf. *Chew Heong* v. *United States*, 112 U. S. 536, 549; *Hauenstein* v. *Lynham*, 100 U. S. 483, 487.

In this background of law plaintiffs submit that the President's review power should be construed to require him personally to enforce the Section 412 formula and not to authorize him to override it for foreign or domestic transportation policy purposes.

G. To construe the Section 411 proviso as requiring the President to see to it that any toll prescribed by defendant conforms to law fits precisely with the Constitutional definition of his duty; if it is an "unlimited delegation", it is unconstitutional. We have already shown that rate-making is a legislative function, that under the Constitution Congress has the legislative power and the President the executive power, that the legislature defines a rate policy and that the executive or an independent agency administers it. As this Court said in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 587: "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker".

To characterize the Section 411 proviso as an "unlimited delegation" of the rate-making power, as did the District

Judge (R. 227) is to say that it is unconstitutional. In our system there is no such thing as an "unlimited delegation" of legislative power; strictly speaking, there is no such thing as *any* delegation of legislative power.

In *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, this Court held unconstitutional Section 9 (c) of the National Industrial Recovery Act, 48 Stat. 195, 200 by which the President was authorized to prohibit the interstate transportation of oil produced in excess of state permission. Explaining its decision this Court said at p. 430: ". . . the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited".

In that case the lone dissent of Mr. Justice Cardozo agreed with the other members of the Court on this principle. He said at p. 434:

> "I concede that to uphold the delegation there is need to discover in the terms of the act a standard reasonably clear whereby discretion must be governed".

In the later NIRA case of *Schechter Corp.* v. *United States*, 295 U. S. 495, the Court summarized its conclusion in *Panama Refining* that Congress could not delegate legislative power and continued at p. 530:

> "Accordingly, we look to the statute to see whether Congress has overstepped these limitations, —whether Congress in authorizing 'codes of fair competition' has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others".

Finding that Congress had not itself established standards, the Court held unconstitutional Section 3 of NIRA, under the purported authority of which the codes of fair competition had been promulgated.

Thus if we construe the Section 411 proviso to confer authority looking to the enforcement of the Section 412 policy, the proviso conforms precisely to the Constitution; if not, then there is no standard and the proviso is invalid.

H. The review power was not provided to protect the American shipping industry. The Court of Appeals suggest that the review power was conferred upon the President to protect the American shipping industry (R. 248). With great respect, we are unable to find any support for that proposition in the references cited by the Court or anywhere else.

On the contrary, we think it clear from the legislative history that the proviso had no such purpose.

In the first place, the suggestion clearly originated in the Bureau of the Budget (R. 102).

In the second place, the shipping industry did propose a very different protective clause in case the formula should work adversely, viz., that tolls should be limited in any event to $1 a ton. This clause was approved by the Merchant Marine Committee and by the House of Representatives and inserted in Section 14 of the bill. However, at the hearing before the Armed Services Committee the limitation was opposed by the representatives of the Department of Defense, the Bureau of the Budget, and of the Association of American Railroads as contrary to the bill's "theory and philosophy" (R. 110, 113, 131-132, 142). The Committee accepted their reasoning and deleted the $1 ceiling as "entirely inconsistent with the principles of this legislation" (R. 165).

This episode serves both to negate the theory that the review power was to protect American shipping and further to evidence the intent of Congress that the formula rate therein provided should be the toll.

POINT V.

Whatever may be the power of the President and whatever plaintiffs' rights of judicial review of tolls determinations, when made, defendant may be compelled to prescribe tolls. Corporations and agencies may be compelled to act, although their action, when taken, is not subject to judicial review, or for any reason may never become effective. This rule is applicable to administrative procedures of which the final outcome is Presidential action not subject to judicial review.

The proposition stated in the heading was considered by the courts below the major issue on the jurisdictional phase of the case.

Plaintiffs take sharp issue with defendant's presentation of this question.

Defendant speaks of judicial review.

What defendant seeks is judicial compulsion of procedures required by law. The cases are very clear that the compliance with statutory procedures will be compelled in circumstances in which the result reached by those procedures is not subject to judicial review.

Defendant, continually speaking of the approval of the President, seems to imply that where Presidential action is the final outcome of statutory procedures, the usual authority of the courts to compel action is not available.

Plaintiffs submit that no such exception exists, and that defendant's premises are fallacious.

No assurance of any effective result: In *Virginian Ry.* v. *Federation,* 300 U. S. 515, the issue was whether a court could compel the defendant, a railway company, to "treat with" a labor union, as required by §2, Ninth of the Railway Labor Act. The defendant argued that a decree would be idle because nothing in the statute required that negotiations result in agreement. This Court overruled that argument in a passage of particular importance because it based its decision on the analogy to the power of a court to compel administrative action which, when taken, was not subject to judicial review. Thus the Court said at p. 551:

> "Whether the decree will prove so useless as to lead a court to refuse to give it, is a matter of judgment to be exercised with reference to the special circumstances of each case rather than to general rules which at most are but guides to the exercise of discretion. It is a familiar rule that a court may exercise its equity powers, or equivalent mandamus powers, United States *ex rel.* Greathouse *v.* Dern, 289 U. S. 352, 359; to compel courts, boards, or officers to act in a matter with respect to which they may have jurisdiction or authority, although the court will not assume to control or guide the exercise of their authority. Interstate Commerce Comm'n *v.* Humboldt S. S. Co., 224 U. S. 474; Louisville Cement Co. *v.* Interstate Commerce Commission, 246 U. S. 638; see Work *v.* United States *ex rel.* Rives, 267 U. S. 175, 184; Wilbur *v.* United States *ex rel.* Kadrie, 281 U. S. 206, 218".

Thus *Virginian Ry.* holds that a corporation or an agency can be compelled to perform a statutory duty involv-

ing discretion if there is reasonable likelihood that benefit to the plaintiff will result.

We demonstrated in Part One that enforcement of the statute would result in very considerable benefits to plaintiffs.

Defendant suggests that the President might deprive plaintiffs of the benefits of the statute by forbidding a statutory toll on the basis of non-statutory factors.

Plaintiffs have shown, Point IV, *supra,* that it is the duty of the President to enforce the law and that he does not enjoy an "unlimited delegation". But even if we are wrong on that point, it is most unlikely that the President would on the basis of the non-statutory factors set aside a statutory rate; cf. *supra* pp. 116-117. The numerous professions by the highest officials of the Government disapproving "barriers to trade" and expressing devotion to world trade and to the rule of law respecting international waterways, would be made to appear hollow indeed by any such action.

No power of court review; power of Presidential review. In the *Virginian Ry.* case, this Court cited: "Wilbur *v.* United States ex rel. Kadrie, 281 U. S. 206, 218". The obvious reference was to the following passage at 281 U. S. 218:

> "Mandamus is employed to compel the performance, when refused, of a ministerial duty, this being its chief use. It is also employed to *compel action,* when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way . . ."

The *Wilbur* case concerned an application for a mandamus against the Secretary of the Interior. Although the writ was not granted in that case, there have been, of

course, a great many writs of mandamus against the Secretary of the Interior issued or upheld by this Court. Of particular interest are *Payne* v. *Central Pacific Ry. Co.*, 253 U. S. 228; *Payne* v. *New Mexico*, 255 U. S. 367, 372-373; *Wilbur* v. *Krushnic*, 280 U. S. 306, 319. In these cases the Secretary exercised his discretion on the basis of an erroneous construction of the controlling statute. The courts construed the statute correctly, and remanded the case to the Secretary for the exercise of his discretion on the correct construction of the statute. Similar judicial action against defendant seems necessary to reach a lawful toll.

These writs have been issued against the Secretary of the Interior and other executive officers despite the fact that what they do is subject, implicitly if not explicitly, to the approval of the President, as we have shown in Point IV, A, *supra* pp. 106-107.

Our research has not disclosed any litigated case in which the Secretary of the Interior did submit his decision to the President for approval. However, there can be no doubt that at a time when land claims were active and many writs were issued, the Secretaries of the Interior were guided by the President. Chief Justice Taft, who wrote the opinion in the *Myers* case, had, when President, participated in consideration of the Cunningham mining claims after they had become publicly controversial in the agitation against Secretary of the Interior Ballinger. Pringle, *Life & Times of William Howard Taft*, 470-514. His predecessor, President Theodore Roosevelt, had been active in conservation and close to Secretary of the Interior Garfield and his rulings on claims. Pringle, *Theodore Roosevelt*, 430-431; Theodore Roosevelt, *Autobiography*, 412.

Action, when taken, subject to review by court other than the ordering court. In *Interstate Commerce Commission* v. *Humboldt Steamship Co.*, 224 U. S. 474, cited by

this Court in the *Virginian Ry.* case, the Court of Appeals of the District of Columbia granted a mandamus to compel the Commission to act in a case which the Commission had regarded as beyond its jurisdiction. This Court affirmed. The Commission argued that its erroneous "non-action" could only be reviewed by the United States Commerce Court (a court created by the Act of June 18, 1910, 36 Stat. 539, to review decisions of the Interstate Commerce Commission, and abolished by the Act of October 22, 1913, 38 Stat. 208, 219). The Court, at 224 U. S. 484, asserted that "the proposition is plainly without merit, even although it be conceded, for the sake of argument, that the Commerce Court is by law vested with the exclusive power to review any and every act of the Commission taken in the exertion of the authority conferred upon it by statute * * *."

In short, the courts of the District of Columbia had power to compel the Commission to act, despite the fact that power of review of any action taken was located elsewhere.

Louisville Cement Co. v. *Interstate Commerce Commission,* 246 U. S. 638, also cited by this Court, follows the *Humboldt Steamship Co.* case.

Unreviewable action. In *Delaware & Hudson R. Co.* v. *Williams,* 129 F. 2d 11 (C. A. 7th), the Court granted a mandatory injunction compelling a Division of the National Railway Adjustment Board to proceed with the arbitration of certain labor disputes, overruling the Board's contention that it could not be compelled to act because its conclusions were not reviewable. The Court said at 129 F. 2d 16:

> "Appellees contend that the division is an administrative tribunal whose orders are the result of its advised discretion. It therefore can not be compelled to proceed and make an award. The fallacy of this

reasoning arises out of the failure to distinguish between the action of the court in compelling an administrative tribunal *to act*, and a proceeding to compel the administrative tribunal to act in a *particular way*. Courts may not determine *how* the administrative tribunal shall act. They may, however, compel such body *to act*".*

Other cases to the same effect include *Hospoder* v. *United States*, 209 F. 2d 427 (C. A. 3d), in which the Court compelled agency action expressly declared by statute to be final; cf. *Safeway Stores* v. *Brown*, 138 F. 2d 278, 280 (Em. Ct. App.); *American Chain Co.* v. *Federal Trade Commission*, 142 F. 2d 909 (C. A. 4th).

CHICAGO & SOUTHERN AIRLINES AND OTHER CASES CITED BY DEFENDANT IN NO RESPECT LIMIT JUDICIAL POWER TO COMPEL PERFORMANCE OF STATUTES LEADING TO UNREVIEWABLE ADMINISTRATIVE DETERMINATIONS; THAT POWER HAS, ON THE CONTRARY, BEEN EXPRESSLY RECOGNIZED IN CASES INVOLVING ADMINISTRATIVE PROCEDURES LEADING TO UNREVIEWABLE PRESIDENTIAL ACTION.

Defendant and the District Judge have so emphasized *Chicago & Southern Airlines* v. *Waterman SS. Corp.*, 333 U. S. 103, in support of the thesis that the District Court lacked jurisdiction to compel defendant to act as to require extended discussion of that case. We submit that, as demonstrated by the Court of Appeals (R. 251-252) and *infra*, that case is wholly irrelevant.

1. *The present suit is to compel action, not to review a determination.* A preeminent distinction is that in *Chicago & Southern Airlines* the petitioner sought to review action "finalized by Presidential discretion", 333 U. S. 112, not to

* Emphasis by the Court.

compel administrative procedure specified by statute preliminary to that action.

The Civil Aeronautics Board, the administrative body involved in that case, had acted—it had not delayed the performance of its statutory duty for over six years. There is nothing in *Chicago & Southern Airlines* to suggest that the courts could not compel performance in the event of unreasonable delay; on the contrary there is a remark, to which we shall later advert, suggesting that the courts could compel performance.

The District Judge's misconception, as plaintiffs see it, is shown by his statement in footnote 30 that "*McGrath* v. *Kristensen*, 340 U. S. 162, must, of course, be distinguished". Plaintiffs did not cite *Kristensen;* in their view it is irrelevant because relating to judicial review of administrative determination, not judicial compulsion of administrative action.

Comment made by the Court of Appeals on *United States* v. *George S. Bush & Co.*, 310 U. S. 371, also cited by defendant, is also applicable to *Chicago & Southern Airlines* (R. 254):

> "Even assuming the scope of review under that statute and this one to be the same, we think the Supreme Court would have allowed the Court of Customs and Patent Appeals to act in the event the Tariff Commission, like the present defendant, boldly refused to hold any hearings concerning rate changes despite adequate indications that changes were necessary to comply with the statutory formula. The present case would be more comparable to the Bush decision if the present plaintiffs were trying to declare new tolls invalid because of the type of depreciation computation chosen by the agency and approved by the President."

2. *Jurisdiction over procedure, the issue here, is recognized in Chicago & Southern Airlines and upheld in related and subsequent cases concerning administrative procedures leading to Presidential action not subject to judicial review.* *Chicago & Southern Airlines,* like the other authorities cited by defendant on this phase of the case, *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294 and *United States* v. *George S. Bush & Co.,* 310 U. S. 371, in no way questions the power of the courts to compel administrative agencies to proceed according to statute and it is a question of procedure with which we are now concerned. Nor has *Chicago & Southern Airlines* been regarded by the Court of Appeals of the District of Columbia as immunizing from its scrutiny the procedure of the Civil Aeronautics Board in foreign route certificate cases prior to action by the President.

In *Norwegian Nitrogen Products* this Court wrote an opinion 28 pages long in considering the procedure followed by the Tariff Commission, which it upheld. The question was as to the validity of tariff rates prescribed by the President. The Court evidently regarded it a necessary prerequisite to validity that the subordinate agency comply with statutory procedures. The opinion was wholly unnecessary if the fact of unreviewable Presidential discretion immunized the proceedings of the subordinate agency.

In *George S. Bush & Co.* this Court's decision assumed that the President and the Commission had followed the procedures prescribed by law. The Court so noted at p. 380, and counsel for the United States predicated his argument upon the regularity of its proceedings, saying at 310 U. S. 372:

> "The action taken by the President and the Commission was in substance one stage of the legislative process. Norwegian Nitrogen Products Co. *v.* United

States, 288 U. S. 294. *Such action is not subject to judicial impeachment if the prescribed forms of legislation have been regularly observed.* Id. Here the investigation conducted by the Commission, the hearings which it held after due notice to all interested parties, its report to the President, and his proclamation approving the Commission's recommendation, constituted a full and regular observance of the forms prescribed."

Defendant also cites p. 166 of *Marbury* v. *Madison*, 1 Cranch, 137. At p. 166 this Court upheld the power of the court to compel the performance of legislative commands, as distinguished from matters wholly of executive policy.

In *Chicago & Southern Airlines* itself this Court began its description of the case at 333 U. S. 105: "*By proceedings not challenged as to regularity*, the Board, with express approval of the President, issued an order . . ."

In two cases subsequent to *Chicago & Southern Airlines* the Court of Appeals of the District of Columbia assumed it had power to compel procedure on foreign route certificate applications.

In *Pan American-Grace Airways* v. *Civil Aeronautics Board*, 178 F. 2d 34, that Court sustained on the merits a CAB order refusing to proceed with such an application. The rationale of the Court's opinion takes for granted that the Court could order the Board to proceed in the event of unreasonable delay.

Thus even in a case unquestionably within the doctrine invoked by defendant the Court of Appeals of the District of Columbia has found that it could grant the relief plaintiffs seek here.

In *Seaboard & Western Airlines* v. *Civil Aeronautics Board*, 181 F. 2d 777, the Court dismissed an appeal from an order denying intervention in foreign route certificate

proceedings on the ground that the order was interlocutory because not "dispositive of petitioner's application", and not on the ground that the eventual outcome of the proceeding would be an unreviewable order of the President.

Defendant cites *United States Overseas Airlines* v. *Civil Aeronautics Board*, 222 F. 2d 303. But that case involved judicial review after the President had acted, not judicial compulsion of procedures preliminary to that action.

United States Overseas Airlines does differ from *Norwegian Nitrogen Products* in that, after the President's action, the Court refused to consider claims of procedural irregularity. The rationale of this difference is perhaps the fact that under the Tariff Act, as here, the President was administering legislative policy, whereas the Civil Aeronautics Act made route certificates a matter of executive policy.

3. *Chicago & Southern Airlines differs from this case in many other ways.* *Chicago & Southern Airlines* was carefully distinguished by the Court of Appeals (R. 251-252), as we have already noted, *supra* p. 127. That case involved foreign policy respecting air commerce on secret intelligence, not rate-making for water transportation on openly published accounts.

POINT VI.

Defendant's various distinctions and excuses, that the statute is not "peradventure clear," that rate-making is discretionary, that defendant has been thinking about the toll rate, that to apply the statute would cause a deficit which Congress did not expect, etc., are invalid because of faulty reasoning and false premises.

Assuming what we deny, that the statute is not "peradventure clear," that fact does not excuse defendant from performing its duty. Plaintiffs regard the statute as abundantly clear, Part One, Point I, *supra* pp. 31-33. However, for the purposes of defendant's argument we shall assume that it requires some interpretation.

Not available to a corporation. In its argument on this point defendant cites not a single case against a corporation, Government or private, in which the court failed to apply its own construction of the statute, and accorded any weight to the corporation's construction—as such. Government corporations are entitled to no favors in litigation. *Supra* p. 90.

Defendant has no expertise in statutory administration. Defendant relies on *United States ex rel. Chicago Great Western R. R. Co.* v. *Interstate Commerce Commission*, 294 U. S. 50; *Commissioner of Patents* v. *Whiteley*, 4 Wall. 522, and like cases. These are cases in which an agency with great experience in the administration of a particular statute or group of statutes had made a careful bona fide effort to reach a conclusion. This Court decided not to interfere.

But defendant is a corporation whose primary function is the physical operation of the Canal and various business activities, not the administration of statutes.

Defendant's law officer apparently agrees with plaintiffs' construction of the statute. The only official of defendant who could be expected to have competence in the interpretation of statutes is its General Counsel. He apparently agrees with plaintiffs, *supra* p. 42.

The Administrative Procedure Act requires the court to form its own opinion. Assuming, as defendant does, that its corporate status is to be disregarded, and that it is to be treated solely as an agency of the United States, then Section 10(e) of the Administrative Procedure Act applies (5 U. S. C. §1009):

> "So far as necessary to decision and where presented *the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions . . .*"

The Court of Appeals did not hold that absorption of the losses of business activities was "reasonable from the naked words." Defendant makes much of the remark by the Court of Appeals that defendant's interpretation of the statute was "reasonable from the naked words" (R. 245). What the Court referred to, as the context makes clear, was the theory that putting the statute into effect was a matter of the defendant's contentment. The Court of Appeals had not the slightest trouble holding that the Act did not "give defendant's board of directors *carte blanche* to ignore the statutory mandate whenever the defendant's other business ventures were losing money" (R. 249). Nevertheless defendant quotes the "reasonable from the naked words" expression in a context that would suggest that the Court of Appeals had referred to the absorption of the losses of the business activities.

As we have noted *supra* p. 68, even the "content" theory was not advanced by the defendant, but was conceived by

the District Judge. The Court of Appeals apparently assumed the District Judge had adopted arguments by defendant. Defendant itself has shown little confidence in the "content" theory despite its promulgation by the District Judge.

As a rule the courts give little heed to agencies' pleas to exemption from statutory duties on the ground that the statute requires construction. The plea that an agency should be exempted from compliance with a statute because the statute requires construction is frequently made—perhaps as a matter of routine. Nevertheless in countless cases involving statutory construction the courts have granted relief against agencies.

A memorable passage in *Roberts* v. *United States*, 176 U. S. 221, at p. 231, points out that any "officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform . . ." But, the Court continues, also at p. 231, that does not make his duty to perform it any the less subject to enforcement by the courts.

The rather long passage to which we refer is so highly regarded by the Court that it has been quoted in full in no less than four subsequent cases, *Ballinger* v. *Frost*, 216 U. S. 240; *Lane* v. *Hoglund*, 244 U. S. 174; *Work* v. *McAlester-Edwards Co.*, 262 U. S. 200, and *Wilbur* v. *Krushnic*, 280 U. S. 306.

In all of these cases this Court compelled the performance of duties respecting public property, and the opinions took pages of statutory construction to ascertain the existence of those duties.

That its rate-making involves discretion, and that it was "authorized" to prescribe tolls do not excuse defendant's failure to perform. *The alleged discretion.* Defend-

ant argues rate-making is "... complicated and involved," *New York* v. *United States*, 331 U. S. 284, 335 (Brief, 74).

That is true when many different distances, kinds of service and types of traffic are involved, as in railroad or shipping rate-making, but that fact did not prevent this Court from ordering performance of a statutory duty to prescribe rates. *Interstate Commerce Commission* v. *Humboldt SS. Co.*, 224 U. S. 474; *Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U. S. 638.

In this instance there are only two types of traffic, laden ships and ships in ballast—really only one, as almost all the traffic is in laden ships. There is only one route, i.e., through the Canal, and only one service, i.e., transits. Defendant states its costs annually in advance, in its budget program.

It was because of the extreme simplicity of setting tolls that the duty to do so was conferred on defendant. The Bureau of the Budget recommended (R. 102):

> "Provided that there is agreement as to the formula [i.e., the statutory formula] for establishing tolls rates and adequate business-type accounts and financial reporting, the actual setting of the tolls rate becomes almost a ministerial function which could well be delegated to the corporation's board of directors."

And the Armed Services Report contained a kind of work sheet less than a page long computing a toll rate (R. 167).

Undoubtedly prescribing tolls according to Section 412 does involve limited factors of discretion, or judgment, but so does all rate-making. *Atlantic Coast Line* v. *North Carolina Commission*, 206 U. S. 1, 26, *infra* p. 182. But as we have shown in Point V, corporations and agencies

may be compelled to perform statutory duties involving the exercise of discretion.

The word "authorized". Defendant seeks to excuse itself from its duty under Section 412 because it was "authorized" to prescribe tolls by Section 411. Part One, Point IV, answers this argument, *supra* pp. 68-84, esp. p. 79.

If it be that the statute requires construction as to the basis upon which defendant should exercise its discretion, that fact does not deprive the courts of jurisdiction. At Point I, B, 1, c (Brief, 78-89) defendant makes various arguments the precise point of which eludes us.

If defendant is contending that the courts lack jurisdiction to compel it to perform its statutory duty because the statute requires construction as to the basis upon which the defendant should exercise its discretion in prescribing tolls, the proposition is demonstrably unsound.

Thus in *Payne* v. *New Mexico*, 255 U. S. 367, a case in which the citizen's rights respecting public property were enforced against an agency, this Court upheld a decree which enjoined the Secretary of the Interior and the Commissioner of the General Land Office "from canceling or annulling a lieu land selection . . . under a mistaken conception of their power and duty" (p. 368), and instructed them to make "a disposal of the selection in regular course unaffected by the elimination of the base tract from the reservation" (p. 373), consideration of that elimination having been an error of law. Cf. *supra* p. 125.

A similar injunction was upheld in *Payne* v. *Central Pacific Ry. Co.*, 255 U. S. 228; in *Wilbur* v. *Krushnic*, 280 U. S. 306, the Court sustained a writ of mandamus to the same effect.

That defendant has been thinking about tolls does not excuse its failure to prescribe them. Defendant argues

(Brief, 78-79) that it should be excused from prescribing tolls because of "its continuous observation and evaluation of the pertinent data and of its reasoned determination that, according to its interpretation of the facts and the law, a change in the toll rate is neither indicated nor necessary."

But plaintiffs are entitled to have defendant act on the basis of a correct interpretation of the law and the admitted facts. The defendants were compelled so to act in the cases cited in Point V, such as *Interstate Commerce Commission* v. *Humboldt SS. Co.* and *Payne* v. *New Mexico.* The defendants in these cases could have made and perhaps did make the same statement as this defendant.

Significantly defendant does not identify its General Counsel as the official who made the "interpretation" of "law."

If it be that lowering the toll rate would cause a deficit in the business activities, that fact is not an excuse. *The fault is defendant's.* Defendant at pp. 80-82 makes an argument that is in substance an expression of disagreement with the policy of the statute.

What plaintiffs are seeking to do here is to enforce the statutory tolls formula enacted by the Act of 1950.

Defendant makes the excuse that if it did so there would be a deficit in the operating results of the business activities.

It is quite true that Congress did not anticipate any such result because at the time of the legislation that became the Act of 1950 was under consideration the Panama Railroad Company (the New York company) had invariably earned its overhead and large profits in addition. *Supra* pp. 15, 65. Congress was explicitly told by the Bureau of the Budget, without demur by defendant, that the business activities could earn enough to "cover, in the aggregate,

the interest on the Government's investment and the Company's share of the expense of civil government and related activities" (R. 99); cf. *supra* pp. 36-37.

Defendant now says it can not do so—certainly it has not done so.

If therefore a reduction in tolls would disappoint the expectation of Congress that the Company would be fully self-sustaining that is not the fault of world commerce, but of defendant, either for failing to point to Congress the error in the Bureau's estimate, or for its management of the business activities since July 1, 1951.

Certainly, however, it does not constitute a reason for disregard of the statutory command respecting tolls.

Perhaps this is the appropriate place to take issue with defendant's assertion that plaintiffs demand that the business activities be made to pay their way. Plaintiffs make no such demand. Although Congress undoubtedly so anticipated, it did not so command, and plaintiffs' interest is most indirect. What plaintiffs want is that defendant comply with the command of Section 412(b), as to tolls, in which their interest is direct.

No appropriations would have been required. Defendant draws a dire picture of a necessity for appropriations for the business activities if the toll rate were lowered (esp. at Brief, 86). We do not agree that such a result would be so evil; the business activities serve the Armed Forces whose expenses are properly paid from appropriations.

But appropriations would not have been necessary. For the years 1951-1954 the losses of the business activities were $14,807,971 as calculated by the GAO, *supra* p. 55. But in the same period defendant paid $23,957,853 interest and in addition had a net income of $13,028,533. If tolls had been charged in accordance with the formula defendant

would have paid $9,149,882 interest to the Treasury.* In other words, at the statutory rate, which is considerably less than the 90¢ rate, tolls would have paid Canal expenses, including overhead, the expenses of the Zone Government, heavy losses of the business activities, and large sums in interest.

Section 246(c), Title 2, of the Canal Zone Code, as amended by the Act of 1950, anticipates that interest may not be earned in full. Section 246(c) provides for defendant's payments of interest to the U. S. Treasury. The final sentence of this statute reads: "Payments of such interest charges shall be made annually to the extent earned, and if not earned shall be made from subsequent earnings" (Defendant's Brief, 164-165).

The doubtful sincerity of defendant. We cannot refrain from observing that there is every reason to believe that defendant's argument dealt with here is a rationalization concocted after the event. The purpose was to justify what its own General Counsel warned defendant was disobedience of the statute under circumstances that indicate that in defendant's organization it was taken for granted that by proper pricing policies the losses of the business activities could be avoided. Defendant's then President (Brig. Gen. J. S. Seybold) nevertheless overruled General Counsel, withheld his opinion from the Board of Directors, and loaded the losses of the business activities against tolls. *Supra* pp. 42-43. We shall withdraw this suggestion when defendant makes available to the court what it has already made available to GAO, i. e., General Counsel's opinion, and that opinion shows we are mistaken.

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* $23,957,853 plus $13,028,533 minus $27,836,504.

POINT VII.

Plaintiffs had standing to sue. By Article III, Section 1, of the Hay-Pauncefote Treaty, incorporated in municipal law by the Act of 1950, plaintiffs' ships were guaranteed freedom of navigation through the Panama Canal at reasonable rates. *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, and *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, do not apply.

Plaintiffs had standing to sue, whether defendant be regarded as a corporation subject to suit or as an agency of the United States subject to the body of law applicable thereto, including the Administrative Procedure Act.

Article III, Section 1 of the Hay-Pauncefote Treaty, 32 Stat. 1903, incorporated by reference in Section 412 (d) by the Act of 1950, and in any event the "supreme Law of the Land" under Article VI of the Constitution, provides that "The canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules" and that "conditions and charges of traffic shall be just and equitable."

Thus the United States is under a duty to permit the "vessels of commerce" of the world to use the Canal upon the payment of "just and equitable" charges. This duty has devolved upon defendant, as the agency of the United States in possession of the Canal. The coincident transfer of the Canal to a corporation subject to suit and the incorporation of Article III, Section 1 in municipal law by the Act of 1950 are forceful evidence of Congressional policy in this respect.

Plaintiffs' standing to sue defendant, considered as a private corporation. Defendant's challenge to plaintiffs'

standing to sue is predicated on its status as agency of the United States. All Government corporations are agencies of the United States, but, as we have seen *supra* p. 90, they are not entitled to any dispensations in litigation, except as to execution.

The duty to supply service without discrimination and at reasonable rates is the classic characteristic of the public utility. *Munn* v. *Illinois*, 94 U. S. 113.

As shown *supra* p. 90, Congress intended by the Act of July 16, 1949, Public Law 172, 81st Congress, 1st Session, to restore to defendant its former status as subject to suit "*in the same manner as any private corporation.*"

There can be no doubt that the users of a public utility service supplied by a private corporation have status to litigate rates. *Cf. Munn* v. *Illinois*, *supra*; *Arizona Grocery Co.* v. *Atchison Ry. Co.*, 284 U. S. 370, 383; *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 436; *cf.* cases cited *infra* pp. 186-187. Indeed rate litigation by users of public services is a well-known branch of the law.

And when rates are defined by law, they have status to litigate the rate so defined, as we demonstrate *infra* pp. 142-143, 187.

When a statute imposes a duty on a corporation that duty may be enforced by mandamus and injunction. *Virginian Ry. Co.* v. *Federation*, 300 U. S. 515, and *Steele* v. *L. & N. R. Co.*, 323 U. S. 192, discussed *supra*, are relatively recent cases in which statutory duties were so enforced.

An earlier decision, apposite to this case, is *Union Pacific R. Co.* v. *Hall*, 91 U. S. 343, a suit in mandamus brought to compel the Union Pacific Railroad to operate its route west of Council Bluffs as one continuous line. This Court overruled the objection that relators did not have standing to sue, saying at p. 354:

> "They (relators) were merchants in Iowa, having frequent occasion to receive and ship goods over the

company's roads; but they had no interest other than such as belonged to others engaged in employments like theirs, and the duty they seek to enforce by the writ is a duty to the public generally. The question raised by the objection, therefore, is whether a writ of mandamus to compel the performance of a public duty may be issued at the instance of a private relator".

After discussion of both English and American cases, the Court concluded at p. 355 that there was "a decided preponderance of American authority in favor of the doctrine, that private persons may move for a mandamus to enforce a public duty". The Court sustained the suit and upheld the mandamus granted by the Circuit Court.

Union Pacific v. *Hall* is not as strong as the present case for there the statute did not define the beneficiaries—the duty was simply owed to the public generally. Here defendant is bound by both statute and treaty to serve the "vessels of commerce" of "all nations observing these Rules".

Users of public services have standing to enforce "statutory" as well as "reasonable" rates by suits invoking the general jurisdiction of the courts. Defendant urges that users of public services may enforce "statutory" rates, as distinguished from "reasonable" rates, only pursuant to special statutory provisions (Brief, 121-125). This is one of defendant's sweeping assertions for which it offers negligible authority, and that readily distinguished; such assertions nevertheless throw on plaintiffs a burden of exposition which lengthens this brief.

There are numerous cases in which courts by exercise of general jurisdiction have enforced the right to statutory rates. Canals: *Perrine* v. *Chesapeake & Delaware Canal Co.*, 8 How. 172; turnpikes: *Winchester Turnpike Co.* v. *Croxton*, 98 Ky. 739; railroads: *Heiserman* v. *Burlington*,

C. R. & N. Ry. Co., 63 Iowa, 732;* *Peters* v. *Railroad Co.*, 42 Ohio St. 275; utility companies: *Richman* v. *Consolidated Gas Co.*, 114 App. Div. 216, affirmed, 186 N. Y. 209.

Defendant endeavors to distinguish the *Richman* case, cited by the Court of Appeals, on the ground that it is a state court case (Brief, 124). However, the standing-to-sue rule, because related to the suability of private people, necessarily involves recourse to state court cases. Cases cited by defendant are not to the contrary.

Defendant's lone authority for its bold claim is *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426. But that case held that the provisions of the Interstate Commerce Act for reparations relief forbade recourse to courts of general jurisdiction except in accordance with that Act; in other words, that the Act's reparations scheme superseded the pre-existing reparations scheme. It is a gross distortion of that case to say that it holds that "the user's common law right to reparations is superseded by legislation determining the rates to be charged by the utility" (Brief, 124).

Assuming the rule to be relevant, users of public services may compel the prospective reduction of rates by mandamus and injunction. Defendant makes the claim that the right of the user of public services to lawful rates may be enforced only by suit to collect retrospectively the excess of the rate charged over the lawful rate, and deduces there-

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* The Court said at pp. 738-739:

> "The statute in force at the time of the transaction in question . . . fixed charges which could be lawfully made by railroad corporations for the transportation of property. Charges in excess of those prescribed were unlawful. This statute conclusively determines the charges which shall be considered reasonable . . . All evidence tending to . . . prove that charges higher than those fixed by the statute were reasonable was incompetent."

from that plaintiffs may not enforce prospectively their rights to lawful rates.

We deny that the standing-to-sue doctrine analogy to the liability of a private person is limited to the precise judicial procedure by which the liability of a private person is ordinarily determined. As we read the cases, it suffices that under corresponding circumstances a private person would be subject to some kind of judicially enforced liability.

In any event the contention is without force. Users of public services may litigate rates prospectively.

In *Perrine* v. *Chesapeake & Delaware Canal Co.*, 8 How. 172, referred to *supra* p. 30, this Court held a canal user entitled to an injunction from a court of general jurisdiction to enforce prospectively a statutory rate; in *Richman* v. *Consolidated Gas Co.*, 114 App. Div. 216, 222-223 (1st Dept.), affirmed 186 N. Y. 209, referred to *supra* p. 143, such a court granted a writ of mandamus for that purpose.

And in *People ex rel. Brush* v. *N. Y. Suburban Water Co.*, 38 App. Div. 413 (2nd Dept.), the Court said at pp. 415-416:

> "The appellant's next claim is that the relator cannot be relieved from the payment of exorbitant charges in this proceeding, but he must pay the charges, whatever the appellant may fix, and seek redress by a suit at law to recover the excessive amounts exacted from him. We know no good reason for holding such a rule. In many cases where State Legislatures have sought to compel public corporations, such as carriers, water companies and the like, to render service for inadequate or ruinous prices or rates, the enforcement of the law prescribing such rates has been enjoined by the Federal courts, and the corporations have not been left to seek a remedy by suing the shipper or party receiv-

> ing the service in an action at law for a reasonable compensation. We think the same rule applies equally to both parties, the corporations and the consumers or shippers. If one party is entitled to have the infliction of the wrong prevented, and not be merely remitted to a suit for damages after the wrong has been committed, the other is equally so. There is no more difficulty in determining reasonable rates in a mandamus proceeding than in an equity action."

In *Town of Mamaroneck* v. *N. Y. Interurban Water Co.*, 126 Misc. 382 (Sup. Ct. Westchester Cty.), the Court entertained a suit to enjoin a rate increase announced by a utility company. The Court's opinion said in part, at p. 387:

> "That if the plaintiffs' rights have been invaded and the statute violated as alleged in the complaint, the remedy by injunction as here sought is a remedy available to the plaintiffs and those similarly situated, admits of no doubt. (Whitmore *v.* New York Interurban Water Co., 158 App. Div. 178.) The other remedy available, although not here pursued, is mandamus. (People *ex rel.* Brush *v.* N. Y. Suburban Water Co., 38 App. Div. 413.)"

The Court enjoined the increased rates and directed a refund of any excess over the pre-existing rate collected during the litigation (at p. 414).

In *Salt River Canal Co.* v. *Nielsen*, 10 Ariz. 9, the Court by injunction enforced lawful rates prospectively against a canal company.

In both *Town of Mamaroneck* and *Salt River Canal Co.* the Court granted what plaintiffs seek here, viz., both prospective and retrospective rate relief.

THAT PLAINTIFFS ARE NATIONALS OF THE UNITED STATES IN NO WAY LESSENS THE RELEVANCE OF THE HAY-PAUNCEFOTE TREATY TO THEIR STANDING TO SUE.

Defendant has argued that a national of the United States cannot acquire justiciable rights under a treaty, citing *Skiriotes* v. *Florida*, 313 U. S. 69.

The premise of this argument is unfounded, because Article III, Section 1 of the Hay-Pauncefote Treaty applies to defendant not only by virtue of the Treaty as such, but also by reason of the incorporation of that Section of the Treaty in Section 412(d), a domestic statute, by the Act of 1950.

Moreover, the argument is without force and is in no way supported by *Skiriotes*.

That United States nationals may enforce rights conferred by treaties is attested by such cases as *Warren* v. *United States*, 340 U. S. 523, in which plaintiff recovered against the United States under the Shipowners' Liability Convention, 54 Stat. 1693, *Garcia* v. *Pan-American Airways, Inc.*, 269 App. Div. 287 (2d Dept.), affirmed 295 N. Y. 852, cert. denied, 329 U. S. 741, *Ross* v. *Pan-American Airways, Inc.*, 299 N. Y. 88, and *Indemnity Ins. Co.* v. *Pan-American Airways, Inc.*, 58 F. Supp. 338, in which a domestic corporation successfully asserted a limitation of liability provided by the Warsaw Convention, and *Hidalgo Water District* v. *Hedrick*, 226 F. 2d 1 (C. A. 5th), in which the claim of a domestic municipal corporation under a treaty with Mexico was considered on the merits.

At least one statute assumes that United States nationals may have substantive rights under treaties: 28 U. S. C. §1502.

28 U. S. C. §1502 provides that "except as otherwise provided by Act of Congress" the Court of Claims may not

entertain claims growing out of treaties. *Ex parte Atocha*, 17 Wall. 439, refers to a decision of the Court of Claims upholding the claim of a United States citizen growing out of the Treaty of Guadalupe Hidalgo, entertained pursuant to permissive legislation.

Skiriotes v. *Florida*, relied upon by defendant, not only fails to sustain the defendant's argument, but is, by implication, an authority directly to the contrary. In *Skiriotes* the appellant had been convicted by the Florida courts of an offense committed two marine leagues from the Florida shore. He maintained that under various treaties the territory of the State of Florida extended only one marine league from shore and that the Florida courts were therefore without jurisdiction. This Court overruled appellant's claim, but *not* on the ground that a United States national could not assert a right under a treaty. *The Court assumed that he could.* The rationale of the Court's decision was that the United States, and the individual states thereof, had extraterritorial powers over their citizens, citing *American Banana Co.* v. *United States*, 213 U. S. 347, 355-356; *United States* v. *Bowman*, 260 U. S. 94; *Cook* v. *Tait*, 265 U. S. 47, *Blackmer* v. *United States*, 284 U. S. 421, 437; and *The Hamilton*, 207 U. S. 398.

A matter of intention. Of course treaties may be negotiated and drawn so as not to confer rights upon United States nationals. In the present instance, however, the language of the Treaty admits of no doubt. Freedom of navigation is granted "vessels of commerce and of war of all nations observing these Rules" referring to the Rules stated in Article III. There can be no doubt that plaintiffs' ships come within this language. Defendant makes no contention to the contrary. Defendant is forced to argue that there is something inherent about a treaty by reason

of which a United States national can take no advantage. As we have seen, there is no support for this proposition.

Plaintiffs' standing to sue defendant considered as an agency of the United States. Plaintiffs similarly have standing to sue defendant if it be considered liable solely as an agency of the United States—but, as we have already noted, we deny that defendant can be considered solely so liable.

As Justice Frankfurter said in his concurring opinion in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 152, "A litigant ordinarily has standing to challenge governmental action of a sort that, if taken by a private person, would create a right of action cognizable by the courts."

The Court of Appeals of the Second Circuit took the same view in *Associated Industries* v. *Ickes*, 134 F. 2d 694, 700 (C. A. 2d).

That plaintiffs have a right to litigate rates with defendant considered as a private corporation has already been demonstrated.

Some cases appear to have gone somewhat further. In *Reade* v. *Ewing*, 205 F. 2d 630 (C. A. 2d), the Court held that a citizen who bought margarine for consumption by his family had standing to sue the Federal Security Administrator over an order respecting the labeling of margarine. In *Atchison, Topeka & Santa Fe R. Co.* v. *Summerfield*, 128 F. Supp. 266 (D. C.), the Court held that a group of railroad companies had standing to sue the Postmaster General for a declaratory judgment and an injunction against the transportation of 3¢ postage mail by air.

Section 10(a) of the Administrative Procedure Act confers standing to sue on those "suffering legal wrong because

of any agency action, or adversely affected or aggrieved by such action, within the meaning of any relevant statute." Section 2(a) defines "action" to include "failure to act."

In *United States* v. *Public Utilities Commission*, 151 F. 2d 609 (C. A. D. C.), the Court held that a consumer of electric power was a person "affected" by a rate order within the meaning of §43-704 and 705 of the District of Columbia Code. The Court said at p. 613:

> "Giving to the words quoted the meaning commonly attributed to them, and assuming that Congress intended to use them in their ordinary and usual sense, there can be no question that a consumer of Potomac [referring to Potomac Electric Power Co.] is a person or corporation affected by the Commission's order".

In that case the Court overruled the contention that under *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, and *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, a consumer did not have standing to sue.

So far as we are aware no case has ever held that administrative action injurious to a legal right conferred upon the individual as such is beyond judicial review.

On the contrary the current trend has been to review administrative action in derogation of rights not nearly so specific, so well recognized and so carefully spelled out as plaintiffs'.

Illustrative of this trend are *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, in which the Court held an organization entitled to judicial review of an unfavorable listing made for purposes of screening government personnel, *Harmon* v. *Brucker*, decided March 3, 1958, in which this Court held that an Army dischargee could compel the Secretary of the Army to grant him a proper discharge,

and *Schactman* v. *Dulles*, 225 F. 2d 938 (C. A. D. C.), in which the Court reviewed the denial of a passport.

These and similar decisions reflect the climate of opinion that the citizen should have relief against "administrative lawlessness." *Peters* v. *Hobby*, 349 U. S. 331, 345.

The Court of Appeals well said (R. 255):

> "The growing tendency of the courts and Congress has been to submit more matters once thought to concern internal government administration to examination in open court. See, e. g., Honovich v. Chapman, D. C. Cir., 191 F. 2d 761 (Secretary of the Interior's regulations concerning Indians' wills); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123 (Attorney-General's listing of organizations for use in screening government personnel); Shachtman v. Dulles, D. C. Cir., 225 F. 2d 938 (passport denial); Textile Workers Union of America v. Allendale Co., D. C. Cir., 226 F. 2d 765 (Wash-Healey Act determinations reviewable under the Fulbright Amendment, 66 Stat. 308, 41 U. S. C. §43a, which overruled Perkins v. Lukens Steel Co., supra, 310 U. S. 113); Administrative Procedure Act, 5 U. S. C. §1009(c), 'every final agency action for which there is no other adequate remedy in any [fol. 258] court shall be subject to judicial review.' We think the intent of Congress was to allow judicial review in these circumstances."

The Administrative Procedure Act. Defendant's brief argues the Administrative Procedure Act in great detail. We are somewhat reluctant to introduce a major discussion of the Administrative Procedure Act in this already lengthy brief, for a number of reasons:

1. Defendant's argument disregards its status as a corporation subject to suit.

2. Defendant relies almost entirely on cases decided before the Act, e. g., *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, and *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113. These cases are readily distinguished, *infra* pp. 151-154.

3. Defendant seeks sharply to narrow judicial review—an attitude wholly at odds with this Court's declarations of sympathy towards the view that the Act is broadly remedial.

4. Plaintiffs' belief that defendant's argument is most unpersuasive is confirmed by the summary dismissal of that argument by the Court of Appeals (R. 255):

> "Nor is there any lack of standing to sue. Section 10(a) of the Administrative Procedure Act, 5 U. S. C. §1009(a) confers standing on persons 'suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute' and the plaintiffs can point to the Panama Canal Act of 1912, as amended in 1950, as well as the Hay-Pauncefote Treaty, as their statutory authority."

Nevertheless, in view of the importance of this case we shall comment on defendant's argument at what we trust is only moderate length.

Alabama Power Co. v. *Ickes and Perkins* v. *Lukens Steel Co. are very different cases from this.* These two cases have become the cornerstone of defendant's argument. They are definitely the cases most frequently cited by defendant—*Perkins*, on 13 different pages; *Alabama Power*, on 9 [next comes *Chicago & Southern Airlines*, on 8; the rest are scattering] (Brief, v-xii). The weakness of defendant's position is forcefully shown by its need to make such heavy use of cases so obviously different.

Perkins and *Alabama Power* are both cases in which, to refer to the test which Justice Frankfurter suggested in *Joint Anti-Fascist Refugee Committee* and the Second Circuit Court of Appeals in *Associated Industries*, the plaintiff could not possibly have brought suit against private persons for the kind of action taken by the defendant government official. Both cases turned on that very ground.

In *Perkins* certain steel manufacturers, planning to bid on government contracts for steel, sued to enjoin enforcement of the terms of the specifications on the ground that they had not been drawn in accordance with the Public Contracts Act.

In *Perkins* this Court said at p. 127:

> "*Like private individuals and businesses*, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases".

But the Government does not enjoy unrestricted power over navigation and rates on the Panama Canal. The Government has restricted itself, and granted rights to plaintiffs, in both these respects by the Hay-Pauncefote Treaty.

This Court also observed at p. 130 that,

> "A like restraint applied to purchasing by *private business* would be widely condemned as an intolerable business handicap".

On the other hand judicial examination of rates for public services supplied by private corporations is familiar.

The contrast in purpose of the respective acts. In *Perkins* this Court further declared at p. 128 that the

"purpose of the Public Contracts Act" was "to impose obligations upon those favored with Government business and to obviate the possibility that any part of our tremendous national expenditures would go to forces tending to depress wages and purchasing power and offending fair social standards of employment".

And in *Perkins* this Court emphasized that the legislation in question had not been enacted for the benefit of the respective plaintiffs. 310 U. S. 126. That is, the Public Contracts Act had not been adopted for the sake of steel manufacturers.*

But here both the Hay-Pauncefote Treaty and the Act of 1950 were adopted for the benefit of the plaintiffs and their class. Since 1826 the United States repeatedly professed its desire that there be an interoceanic canal across Central America for the benefit of the world's commerce at reasonable tolls. It made a Treaty to that effect. It entered the Isthmus by "mandate from civilization" to

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* Defendant's reliance (Brief, 118-120) upon the Fulbright Amendment is misplaced. Whether or not the Fulbright Amendment "overruled" *Perkins*, as the Court of Appeals said (R. 255), it certainly was a provision for judicial review in circumstances in which *Perkins* had held such review was not available. Therefore, if plaintiffs have successfully distinguished *Perkins* they necessarily have also shown that the Fulbright Amendment is not relevant, and its only connection can be to show the increasing tendency of Congress to subject administrative action to judicial review.

The colloquy cited by defendant (98 Cong. Rec. 6531) shows Senator Fulbright advised the Senate that the Public Contracts Act was an "exception" to the Administrative Procedure Act. Thus Congress was granting judicial review to a special situation thought to have been excluded from the Administrative Procedure Act. Its action in adopting the Fulbright Amendment, if it can be said to be an interpretation of the Administrative Procedure Act at all, meant that Congress wished persons relatively indirectly concerned with administrative action, such as prospective bidders on Government contracts, to have the judicial review provided by the Administrative Procedure Act which it assumed that persons more directly concerned with such action already had.

accomplish that result. How anomalous it is to argue now that the statutes of the United States relating to tolls may not be availed by shipowners to seek a judicial determination of the toll rate!

The transfer to a corporation subject to suit. Moreover, the Act of 1950, here sought to be enforced, also provided for the transfer of the Canal to defendant, a corporation well known to be subject to suit, a corporation expressly made subject to suit like "any private corporation" by the same Congress only a year earlier. *Supra* pp. 90-91.

The Public Contracts Act had no such feature.

Alabama Power Co. In this case a group of electric power companies with non-exclusive franchises brought suit to enjoin loans by the United States to various municipalities for the construction of electric plants, on the ground that the official in charge lacked constitutional and statutory authority. Unquestionably the municipalities had the lawful right to engage in competition with plaintiffs.

The approach of this Court was as follows at 302 U. S. 480:

> "Can any one who will suffer injurious consequences from the lawful use of money about to be unlawfully loaned maintain a suit to enjoin the loan? An affirmative answer would produce novel and startling results".

But any one charged an unlawful rate by a public service corporation can bring suit.

The recent case of *Kansas City Power & Light Company* v. *McKay*, 225 F. 2d 924 (C. A. D. C.), repeatedly cited by defendant in this litigation, adds nothing to *Alabama Power*.

Analysis of Section 10(a) and its legislative history. The soundness of the flat holding below is readily demon-

strated by a simple statement of the criteria for judicial review under the "legal wrong" and "adversely affected" clause of Section 10(a) as applied to the facts of this case. That clause grants judicial review to any persons legally wronged or adversely affected by agency action within the meaning of a relevant statute.

(1) Plaintiffs are persons within the definition of Section 2(b) of the Act—5 U. S. C. §1001(b).

(2) Defendant's inaction is agency action as defined in Section 2(g) of the Act—5 U. S. C. §1001(g).

(3) Plaintiffs are suffering legal wrong and are adversely affected by that agency action because of the economic loss imposed upon them as a result—*F. C. C.* v. *Sanders Radio Station,* 309 U. S. 470, 476-477; *American Power Co.* v. *S. E. C.,* 325 U. S. 385, 390; *Associated Industries* v. *Ickes,* 134 F. 2d 694, 702-706, reversed on other grounds, 320 U. S. 707.

(4) Sections 411 and 412 of Title 2 of the Canal Zone Code as amended by the Act of 1950, and the Hay-Pauncefote Treaty, are relevant statutes, both to the agency action complained of and to the adverse effect asserted by plaintiffs. Indeed, it is hard to imagine how there could be any more relevant provision than the requirement of the Treaty that "conditions and charges of traffic shall be just and equitable."

Having satisfied all the requirements of the legally wronged or adversely affected clause, plaintiffs have standing to sue thereunder as held by the Court below.

We submit that the language relied on by defendant in the letters of Attorney General Clark is substantially more consistent with the holding of the Court below and the

statements of this Court in *Heikkila* v. *Barber*, 345 U. S. 229, 232; *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 41; and *Shaughnessy* v. *Pedreiro*, 349 U. S. 48, 51, that Section 10(a) expanded judicial review than with the construction urged by defendant that the Section merely restated pre-existing law. The language of the letters is quoted by defendant (Brief, 111-113) herein as follows:

> "* * * this reflects existing law. In Alabama Power Co. *v.* Ickes, 302 U. S. 464, the Supreme Court stated the rule concerning persons entitled to judicial review. Other cases having an important bearing on this subject are: Massachusetts *v.* Mellon (262 U. S. 447), the Chicago Junction case (264 U. S. 258), Sprunt & Son *v.* United States (281 U. S. 249), and Perkins *v.* Lukens Steel Co. (310 U. S. 113). An important decision interpreting the meaning of the terms 'aggrieved' and 'adversely affected' is Federal Communications Commission *v.* Sanders Bros. Radio Station (309 U. S. 470)".

The logical construction of that language is that the Attorney General cited *Alabama Power, Massachusetts* v. *Mellon, Chicago Junction, Sprunt* and *Lukens* as cases useful in defining "legal wrong", and cited *Sanders* as a case useful in defining persons "aggrieved" and "adversely affected" who would qualify to seek judicial review under the disjunctive portion of Section 10(a), "or adversely affected or aggrieved by such [agency] action within the meaning of any relevant statute". Section 10(a) concededly provides for judicial review to two different classes: (1) those suffering legal wrong and (2) those adversely affected or aggrieved by agency action within the meaning of any relevant statute.

Nor do we see that defendants can derive much comfort from the carefully qualified statements of the Attorney

General that the Administrative Procedure Act "*in general* declares the existing law concerning judicial review" and "*reflects* existing law". We believe it is of considerably greater significance that the Attorney General did not tell the Congress that Section 10(a) was a mere restatement of prior law and that its enactment would be mere supererogation.

Also, the discussion of the legislative history of Section 10(a) as contained in defendant's brief omits salient features in arriving at its conclusion that the section is nothing more than a restatement of pre-existing law.

The House and Senate reports emphasize the "utmost importance" of judicial review and state:

> "It is indispensable since its mere existence generally precludes the arbitrary exercise of powers or assumption of powers not granted."

See S. Doc. 248,* pp. 217, 281-282. Those reports also point out (S. Doc. 248, pp. 212, 275):

> "*It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified.* Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board."

Defendant (Brief, 113-115) quotes a colloquy between Senators McCarran and Austin as to the meaning of legal wrong with the statement that Senator Austin actually had in mind the second part of the clause "adversely affected or aggrieved". The quotation in the defendant's brief, how-

* Referring to S. Doc. 248, 79th Cong. 2d Sess., in which are collected the more important materials in the legislative history of the Administrative Procedure Act.

ever, does not go far enough. Following the reference by Senator McCarran to the Attorney General's letter and the citations to *Alabama Power*, *Massachusetts* v. *Mellon*, *Perkins* v. *Lukens Steel Co.*, etc., Senator Austin inquired:

> "Is it not true that among the cases cited by the distinguished Senator were some in which no redress or no review was granted, solely because the statute did not provide for a review?
>
> "Mr. McCarran. That is correct.
>
> "Mr. Austin. And is it not also true that, because of the situation in which we are at this moment, this bill is brought forward for the purpose of remedying that defect and providing a review to all persons who suffer a legal wrong or wrongs of the other categories mentioned?
>
> "Mr. McCarran. That is true, the Senator is entirely correct in his statement."

Clearly Senators Austin and McCarran understood that Section 10(a) granted review in situations where it had theretofore been available.

The breadth intended for the categories of persons to whom Section 10(a) gave judicial review was also explained as follows by a spokesman in charge of the legislation (Senator McCarran):

> "Mr. McKellar. May I ask the Senator a very general question, which will show that I have not examined the bill with care? Do I correctly understand that the principal purpose of the bill is to allow persons who are aggrieved as the result of acts of governmental agencies to appeal to the courts?
>
> "Mr. McCarran. Yes.
>
> "Mr. McKellar. That is the general underlying purpose of the bill?
>
> "Mr. McCarran. Yes. But let me add, that where a statute denies resort to the court the bill

would not set aside such statute. If a statute denies the right of review, the bill does not interfere with the statute." (S. Doc. 248, pp. 318-319)

The conclusion of defendant's argument addressed to the phrase "within the meaning of any relevant statute" in Section 10(a) is that the phrase was intended by the Congress to mean "where a statute expressly provides judicial review". Since Section 10(a) starts from the premise that judicial review is granted "Except so far as (1) statutes preclude judicial review", that argument amounts to turning the language of Section 10(a) upside down.*

Similarly the interpretation urged by the defendant addressed to that clause of Section 10(a) reading "any person * * * adversely affected or aggrieved by [agency] action within the meaning of any relevant statute, shall be entitled to judicial review thereof" is that the clause means "where a statute expressly grants judicial review this Act does not take it away". Such confusion in language is not lightly to be imputed to the Congress and is, indeed, quite contrary to the obvious purpose of the Act as revealed by its legislative history and to its construction by this Court.

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* Defendant has contended (Brief, 103-104) that to broaden Section 10(a) to permit plaintiffs to sue would permit railroads, shippers and even passengers to litigate tolls. One answer is that the Hay-Pauncefote Treaty mentions only "vessels of commerce". Again, at common law only users of public services may litigate rates; not their customers. The railroads would seem barred by *Alabama Power*. *Massachusetts* v. *Mellon*, 262 U. S. 447, which defendant itself cites (Brief, 112), shows that the courts have no trouble dealing with interests not significant. Further, Rule 23(a) protects defendant from tolls suits in which the complainants are not of sufficient stature to "insure the adequate representation of all."

POINT VIII.

District courts other than the District Court for the District of Columbia have power to grant mandatory injunctions.

Defendant makes the truly amazing argument that the District Court did not have power to grant mandatory relief. Only the District Court for the District of Columbia may grant such relief, defendant argues. We say defendant's argument is "amazing" because the school desegregation program in which the Department of Justice is so active rests almost entirely on the power of district courts to grant mandatory relief.

In *Brown* v. *Board of Education*, 349 U. S. 294, this Court said at p. 301:

> "The judgments below, except that in the Delaware case, are accordingly reversed and the cases are remanded to the District Courts *to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools* on a racially nondiscriminatory basis with all deliberate speed the parties to these cases".

Thus this Court hypothesized that the District Courts in question—viz., the District Courts for Kansas, Eastern South Carolina and Eastern Virginia as well as Columbia, 349 U. S. 294—had the power affirmatively to compel the admission of the plaintiffs in those cases.

Brown v. *Board of Education* is of more than usual significance because the opinion is devoted solely to the question of relief, the merits having already been decided at 347 U. S. 483, 497.

It is noteworthy that in its representations to this Court in *Brown*, the Department of Justice was unaware of any inability of district courts to grant mandatory relief. According to the Department of Justice, at pp. 23 and 24 of its brief *amicus curiae* in the *Brown* case:

> "Specifically, *the lower courts should be instructed to require the defendants either to admit the plaintiffs*, and other Negro children similarly situated, forthwith to public schools on a non-segregated basis, or to propose promptly, for the court's consideration and approval, an effective program for accomplishing the transition as soon as practicable".

And the desegregation program has proceeded in the lower courts on the basis of either explicitly mandatory injunctions, or "double negative" injunctions. To sustain defendant's contention in this case would seem to jeopardize that program.

Plaintiffs submit that this Court did not, in the *Brown* case, direct decrees that were beyond the power of the district courts. On the contrary, the power of such courts to issue mandatory injunctions against private parties, state officers and agencies of the United States is well-settled.

Defendant, considered as a private corporation, may be compelled to act. Let us recall once more that the purpose of the Act of July 16, 1949 was to make defendant subject to suit "in the same manner as any private corporation". *Supra* p. 91.

In *Virginian Ry.* v. *Federation*, 300 U. S. 515, this Court affirmed a decree made by the District Court for Eastern Virginia which, according to this Court at p. 517, "commanded the Company to treat with the Federation".

As noted *supra* pp. 123-124, this Court at 300 U. S. 551, equated the powers of a district court to grant mandatory relief in equity with those of the courts of the District of Columbia to grant writs of mandamus against Government officers.

In the *Virginian Ry.* case the Court of Appeals discussed the authority of the District Court to issue a mandatory injunction at some length. That Court relied particularly on *In re Lennon*, 166 U. S. 548, in which this Court said that a "court of equity" may "require affirmative action" by writ of mandatory injunction. 166 U. S. 556, referred to at 84 F. 2d 641, 646-647.

Contrary to defendant's suggestion (Brief, 97), these express discussions of the power to grant mandatory injunctions by both this Court and the Court of Appeals show that no one assumed that the district courts' power under 45 U. S. C. §153, First (p), to enforce orders of the Adjustment Board by writ of mandamus applied to Section 2.

In *Peoria Ry. Co.* v. *United States*, 263 U. S. 528, this Court upheld the power of district courts to enforce switching duties by mandatory injunction, saying at p. 535:

> "The switching order here in question compels performance of the primary duty to receive and transport cars of a connecting carrier. That courts may enforce such duties by mandatory injunction, including a preliminary restraining order, has long been recognized".

As authority for this proposition this Court wrote a footnote, also at p. 535, as follows:

> "See Toledo, Ann Arbor, etc., Ry Co., *v.* Pennsylvania Co., 54 Fed. 730, 746; Chicago, Burlington & Quincy Ry. Co. *v.* Burlington, Cedar Rapids & Northern Ry. Co., 34 Fed. 481. Compare Chicago,

Milwaukee & St. Paul Ry. Co. *v.* Iowa, 233 U. S. 334; Covington Stockyards Co., *v.* Keith, 139 U. S. 128; Union Pacific R. R. Co. *v.* Hall, 91 U. S. 343".

In *Covington Stockyards* this court affirmed a decree of the Circuit Court for Kentucky requiring elaborate and diverse affirmative action. 139 U. S. 131-133.

Union Pacific has already been referred to herein, *supra* pp. 123-124.

St. Paul originated in the state courts of Iowa.

Toledo, Ann Arbor and *Chicago, Burlington* are district court cases directly in point and affirmatively approved by this Court by the citation in *Peoria Ry.*

Again, in *Lucking* v. *Detroit Navigation Co.*, 265 U. S. 346, and *Moor* v. *Texas & N. O. R. Co.*, 297 U. S. 101, this Court recognized the power of a district court to grant a mandatory injunction, although holding that it would not interfere with the decisions of the lower courts to refuse such an injunction on the facts of those cases.

A Note published by the Columbia Law Review in 1938, cited by the Court of Appeals, carefully considers the question of mandatory relief in the federal courts. The Court of Appeals cites this Note for the proposition that "the lower federal courts have not been consistent" respecting their power to grant mandatory injunctions (R. 257). Although it is quite true that the courts have not been entirely consistent, the Note demonstrates and concludes that the courts have by a large majority found jurisdiction in cases comparable to this. The author of this Note found 38 cases in which in his opinion plaintiffs had brought suit for mandatory injunctions which were the equivalent of mandamus; in only eight was relief denied on the ground plaintiff was seeking a mandamus; on the other hand in thirty the author maintained

the relief was either granted, or denied on the merits. Footnote 24, 38 COL. L. REV. 907. In the opinion of plaintiffs, seven of these thirty cases, and one of the seven, are too vague or cryptic to support the proposition. We cite the remaining thirty in the footnote below.* It will be observed that many of these cases are suits against United States government officers or agencies. These will be con-

* Cases cited by Columbia Law Review in which mandatory injunctions were granted or considered on the merits: *Gibson Howell Co. v. Helvering*, 80 F. 2d 592 (C. A. 3d) (U. S. agency); *Sturges* v. *Pease*, 48 F. 2d 1035 (C. A. 2d) (U. S. agency); *Loisel* v. *Mortimer*, 277 Fed. 882 (C. A. 5th) (U. S. agency); *Griffith* v. *Vick Grocery Co.*, 272 Fed. 246 (C. A. 6th); *Bulger* v. *Benson*, 262 Fed. 929 (C. A. 9th) (U. S. agency); *Chicago* v. *Fox Film Corp.*, 251 Fed. 883 (C. A. 7th) (state agency); *Gretch Mfg. Co.* v. *Schoening*, 238 Fed. 780 (C. A. 2d); *Spang* v. *Roper*, 13 F. Supp. 840 (E. D. Pa.), reversed on merits sub. nom. *Gosnell* v. *Spang*, 84 F. 2d 592 (C. A. 3d) (U. S. agency); *Asher* v. *Ingels*, 13 F. Supp. 654 (S. D. Cal.) (state agency); *Jackson* v. *Railroad Commission of Texas*, 12 F. Supp. 348 (W. D. Tex.) (state agency); *Knapp* v. *Hyde*, 50 F. 2d 272 (S. D. N. Y.) (U. S. agency); *Armbruster* v. *Wildwood*, 41 F. 2d 823 (D. N. J.) (state agency); *Baucum* v. *Jackson*, 35 F. 2d 248 (W. D. La.), (U. S. agency); *Casper* v. *Dolan*, 30 F. 2d 400 (E. D. Pa.), affirmed, 281 U. S. 610 (U. S. agency); *Wilson* v. *Bowers*, 14 F. 2d 976 (S. D. N. Y.) (U. S. agency); *Hoffman Brewing Co.* v. *McElligott*, 259 Fed. 321 (S. D. N. Y.), order modified, 259 Fed. 525 (C. A. 2d) (U. S. agency); *Stephens* v. *Ohio State Tel. Co.*, 240 Fed. 759 (N. D. Ohio); *Postal Cable Tel. Co.* v. *Cumberland Tel. & Tel. Co.*, 177 Fed. 726 (C. C. M. D. Tenn.); *St. Louis & S. F. Ry.* v. *Cross*, 171 Fed. 480 (W. D. Okla.) (state agency); *Fleischman Co.* v. *Murray*, 161 Fed. 152 (C. C. S. C.) (state agency); *Wiemer* v. *Louisville Water Co.*, 130 Fed. 251 (W. D. Ky.), reversed on other grounds 130 Fed. 257 (C. A. 6th); *Mutual Life Ins. Co.* v. *Boyle*, 82 Fed. 765 (C. C. Kan.), (state agency); *Metropolitan Life Ins. Co.* v. *McNall*, 81 Fed. 888 (C. C. Kan.) (state agency); *Parsons* v. *Marye*, 23 Fed. 113 (E. D. Va.) (state agency).

Cases in which suits for mandatory injunctions were dismissed for lack of jurisdiction: *Stevenson* v. *Holstein-Friesian Ass'n of America*, 30 F. 2d 625 (C. A. 2d); *White* v. *County Democratic Executive Committee*, 60 F. 2d 973 (S. D. Tex.); *Stevens* v. *School District*, 5 F. Supp. 629 (S. D. Miss.) (state agency); *Knickerbocker Ice Co.* v. *Sprague*, 4 F. Supp. 499 (S. D. N. Y.) (state agency); *Finerán* v. *Bailey*, 2 F. 2d 363 (C. A. 5th) (state agency); *Creager* v. *Bryan*, 287 Fed. 362 (S. D. Tex.) (state agency); *Whitaker and Ray Co.* v. *Roberts*, 155 Fed. 882 (C. C. Nev.) (state agency).

sidered in greater detail *infra*. It is further to be observed that, with a single exception, all the cases denying power to issue a mandatory injunction had been brought against state agencies. Certainly that question has been resolved in favor of jurisdiction, and those cases overruled, by *Brown* v. *Board of Education* and the other Negro cases.

The cases cited in this Note are clearly not complete, as evidenced by several cases decided before 1938 and mentioned in this brief, such as *Lennon* and *Peoria Ry.* and cases cited therein, but not referred to in the Note. It is difficult to locate all cases in which mandatory injunctions have been granted, or applications entertained on the merits, because so often jurisdiction is assumed, without discussion, as, for instance, in *Moor* v. *Texas & N. O. Ry. Co.* and *Lucking* v. *Detroit Navigation Co.*, *supra* p. 163.

The Negro cases. In recent years Negro citizens have brought numerous suits against educational institutions to compel their admission as students on equal terms, and against election officials to compel their registration to vote. Uniformly these plaintiffs have sought affirmative mandatory relief, although often the papers for relief have asked for "double negative" injunctions. Many of these cases have been highly publicized; many have been reviewed by this Court.

So far as our research discloses, these cases have invariably been decided on the merits; in most cases the relief has been granted. We have already referred to *Brown* v. *Board of Education*, 349 U. S. 294. Among other recent decisions by this Court are *Lucy* v. *Adams*, 350 U. S. 1, vacating the suspension of a double negative injunction issued by the District Court for the Northern District of Alabama to require the defendants to accept plaintiff as a student at the University of Alabama, and *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637, requiring the defend-

ants to provide plaintiff "the same treatment as students of other races". In *Lucy* v. *Adams* this Court cited as precedents, among others, *Sweatt* v. *Painter*, 339 U. S. 629, in which this Court held that the plaintiff must "be admitted to the University of Texas Law School", 339 U. S. 636, and, by reversal, required the issue of the mandamus sought by plaintiff in the state courts of Texas to effect that result.

The citation of *Sweatt* v. *Painter* in *Lucy* v. *Adams* indicates that this Court equates the power of a state court to require affirmative action by mandamus with that of a federal district court sitting in equity.

Lower federal court cases in which Negro plaintiffs were, in substance, granted the affirmative relief indicated include *Bryce* v. *Baird*, 201 F. 2d 664 (C. A. 5th) (defendant ordered to register); *Wilson* v. *Board of Superintendents*, 92 F. Supp. 986 (E. D. La.), affirmed 340 U. S. 909 (defendants ordered to admit); *Tureaud* v. *Board of Supervisors*, 116 F. Supp. 248 (E. D. La.), reversed on other grounds, 207 F. 2d 807 (C. A. 5th) (defendants ordered to admit); *Evans* v. *Board of Education*, 149 F. Supp. 376 (D. Del.) (defendant ordered to submit plan of integration); *School Board* v. *Allen*, 240 F. 2d 59 (C. A. 4th) (defendant ordered to admit); *Clemons* v. *Board of Education*, 228 F. 2d 853 (C. A. 6th) (defendant ordered to admit).

It will be borne in mind that the expression "ordered to admit" refers to decrees which in practical effect required defendants to provide plaintiffs and their class with a nondiscriminatory education.

These cases, taken together and in connection with *Brown* v. *Board of Education*, show a consistent assumption that district courts have the power to compel affirmative action by a defendant not an officer or agent of the United States.

Defendant, considered as an agency of the United States, may be compelled to act. Section 10 of the Administrative Procedure Act relates to "Judicial Review of Agency Action". Subsection (b) covers "Form and venue of proceedings" as follows:

> "The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute, or in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or *mandatory injunction*) in any court of competent jurisdiction . . ."

By this language Congress certainly assumed, if it did not grant, power to issue writs of mandatory injunction against agencies of the United States. The Administrative Procedure Act was enacted in 1946, eight years after the Columbia Law Review Note to which we have referred. That Note summed up the law respecting Government agencies as follows (38 COL. L. REV. 911-912):

> "Where it is sought to coerce federal officials the cases are unanimous in considering the merits of the controversy".

The Note cited those cases against Government agencies which we have indicated in the footnote *supra* p. 164, in support of this proposition.

Describing these cases the Note said (38 COL. L. REV. 910):

> "Federal officials have been ordered to issue licenses to: act as pilot, prescribe liquor for medicinal purposes, withdraw alcohol, transport oil, and register automobiles, as well as to deliver revenue stamps for bar".

The Note continued:

> "State officials have been compelled to issue permits to: engage in the insurance or railroad businesses, or to exhibit motion pictures . . ."

The cases in which these mandatory injunctions were issued are also listed appear in the footnote *supra* p. 164.

This being the state of the law when the Administrative Procedure Act was adopted, it seems clear that Congress assumed that the district courts generally had power to grant writs of mandatory injunction, certainly against agencies of the United States.

The prohibition cases. The National Prohibition Act contained provisions similar to Section 10(a) of the Administrative Procedure Act authorizing "review" by a "court of equity" of refusal by the prohibition authorities to issue permits for the use of liquor and of "specially" (i. e. only slightly) denatured alcohol, and of their revocation of such permits after issuance. National Prohibition Act, Title II, §§ 5, 6, 9; 41 Stat. 309-311; 27 U. S. C. A. (1927 ed.) §§ 14, 16, 21. These provisions led to much litigation in courts other than those of the District of Columbia, of which a frequent result was a mandatory injunction to compel the prohibition authorities to issue or to reinstate such permits and in which applications for such relief were considered on the merits. So far as our research discloses, in no case was suit for such relief dismissed for lack of power to grant a mandatory injunction. Many of these cases are digested in the annotations to 27 U. S. C. A. (1927 ed.) §§ 14, 16, 21. Cf. *Ma-King Products Co.* v. *Blair*, 271 U. S. 479; *Daub* v. *Moss*, 47 F. 2d 603 (C. A. 2d); *Hart* v. *Yellowley*, 284 Fed. 245 (C. A. 2d); *Wynne* v. *Eureka Beverage Co.*, 56 F. 2d 516 (C. A. 3d); *Triborough Chemical Corp.* v. *Doran*, 44 F. 2d

626 (E. D. N. Y.); *D. P. Paul & Co.* v. *Medon,* 24 F. 2d 738 (S. D. N. Y.); *Rock* v. *Blair,* 13 F. 2d 1004 (S. D. N. Y.).

In *Ma-King Products Co.* v. *Blair, Commissioner of Internal Revenue,* a case decided by this Court and procedurally typical, the plaintiff's "prayer was that the Court review the Commissioner's action, reverse his findings as to fact and law, and *direct him to approve the application and grant the permit.*" This Court affirmed a decree which dismissed the bill on the merits, and not for want of jurisdiction. The Court's opinion took jurisdiction for granted and construed the statute as providing the same measure of review that would be available in any event. 271 U. S. 480.

DEFENDANT'S CITATIONS ARE NOT RELEVANT.

Defendant relies largely on ancient cases obviously overruled by *In re Lennon, Virginian Ry., Peoria Ry., Brown* and other decisions of this Court.

Defendant's modern cases relate almost exclusively to United States agency personnel matters. But, as noted in *Alley* v. *Craig,* 97 F. Supp. 576 (D. Me.), Section 10 of the Administrative Procedure Act did not provide for review of problems of personnel. "The review contemplated [by Section 10] pertains only to administrative orders or rulings of an agency carrying out its functions" (p. 578).

POINT IX.

It was orderly procedure for the Court of Appeals to direct the entry of summary judgment.

Defendant's grievance against the decision by the Court of Appeals to grant summary judgment is a repercussion of a clever move made by defendant at the outset of the case.

After plaintiffs had moved for summary judgment defendant made a cross-motion for summary judgment, but sought to avoid its being treated as such by calling it a motion to dismiss for want of jurisdiction. The apparent purpose of defendant's tactic was to secure for its motion a preliminary and separate hearing. Nevertheless, both District Judge Walsh and the Court of Appeals, recognizing defendant's motion for what it was, treated it as a cross-motion for a summary judgment. Accordingly the Court of Appeals properly proceeded as if both motions were before it.

What happened was as follows:

On October 28, 1955 Judge Edelstein issued an order to show cause, returnable December 6, 1955, why summary judgment should not be entered in plaintiffs' favor (R. 10-12). On November 14, 1955, at defendant's request, the return day was adjourned by consent until January 5, 1956 (R. 2)—114 days after the service of the complaint and 69 days after the order to show cause. Defendant sought no further adjournment.

[Meanwhile, as defendant notes in its Brief at p. 132, plaintiffs commenced certain discovery proceedings, largely to get the opinion of defendant's General Counsel referred to at R. 58 by the General Accounting Office. Cf. *supra* pp. 42-43. Defendant has always claimed that these proceedings were inconsistent with the motion for summary judgment, but plaintiffs regard it as proper amplification of the GAO report, one of the moving papers (R. 14), to show the precise language by which defendant's General Counsel expressed his agreement with plaintiffs' construction of the statute.]

On December 16, 1955 defendant served notice of a motion to dismiss, purportedly for want of jurisdiction,

supported by the affidavit of Mr. Leavenworth Colby, Chief of the Admiralty Section of the Department of Justice (R. 185-195).

As examination of Mr. Colby's affidavit will quickly reveal, the affidavit went far beyond questions of jurisdiction and argued such matters as the reasonableness of defendant's delay, the ripeness of plaintiffs' claim, etc. (R. 191-195).

Under these circumstances plaintiffs at a hearing on December 20, 1955 before Judge Walsh strenuously maintained that the defendant's motion, supported as it was by affidavit referring to facts not relevant to jurisdiction, was in substance a cross-motion for summary judgment (R. 203-204).

When Judge Walsh said at the December 20 hearing that he would first consider defendant's motion at a hearing to be held on December 29, 1955, plaintiffs at once and in open court submitted their affidavits in support of their motion for summary judgment as answering affidavits to Mr. Colby's affidavit, the order to show cause being bound with the affidavits. The court clerk then handed plaintiffs' affidavits to Judge Walsh, who replied: "All right, I have got the affidavits to work with already" (R. 206). He then asked when he could get the briefs (R. 206).*

In their brief to the District Court plaintiffs again argued that defendant's motion was in substance a cross-

* Defendant refers to the action of Judge Bicks in marking plaintiffs' motion "off" on January 5, 1956. After the argument before Judge Walsh on December 29, plaintiffs' chief counsel understood that all matters were pending before that Judge. Neither he nor any other representative of plaintiffs attended court on January 5. Presumably the motion appeared on the calendar as a result of the stipulation of November 14, which had been filed in the clerk's office (R. 2), and as a matter of routine, and presumably Judge Bicks marked the motion off because there was no appearance for the motion.

motion for summary judgment, citing 2 Moore, *Federal Practice* (2d ed. 1951) 2247-2255; *Nielson* v. *Farley*, 26 F. Supp. 948 (S. D. N. Y.); *Central Mexico Light & Power Co.* v. *Munch*, 116 F. 2d 85 (C. A. 2d) and other cases. Plaintiffs further urged in their District Court brief (p. 12) that "having disposed of these preliminary objections, your Honor proceed with their motion for summary judgment", and argued that motion at pp. 13-39 of their brief.

When defendant advanced numerous non-jurisdictional arguments in its District Court brief, plaintiffs contended in their reply brief (p. 15):

> "Defendant cannot eat its cake and have it too. Plaintiffs submit that the Court should either treat defendant's motion strictly in accordance with its terms, and disregard arguments directed to the merits and to the validity of the complaint, or else treat it as a motion for summary judgment under Rule 56 and simultaneously entertain plaintiffs' motion for summary judgment."

Judge Walsh's opinion shows conclusively that he regarded and treated defendant's motion as one for summary judgment.

Thus the greater part of his opinion is devoted to his construction of the Act of 1950 as meaning that compliance with the statute was a matter of defendant's pleasure (R. 217-225). Such construction is of course an exercise of jurisdiction. He further found that plaintiffs lacked standing to sue (R. 231). This Court has ruled in the most explicit terms that the question of standing to sue does not go to jurisdiction. *Smyth* v. *Asphalt Belt Ry. Co.*, 267 U. S. 326, 328.

When the case was in the Court of Appeals the Appendix to Plaintiffs' Brief included the papers on the two motions

as if they had both been before the District Court. Defendant made no objection at all. This Appendix has been filed in this Court with defendant's petition for certiorari.

Under these circumstances the Court of Appeals properly regarded the proceedings as constituting cross-motions for summary judgment both of which were then before it.

Judge Clark, the author of that Court's opinion, is a leading expert in federal judicial procedure. He taught pleading and procedure and has written extensively on that subject. *Who's Who in America,* 1956-1957, p. 475. He has been a member of and reporter for this Court's advisory committee on Federal Civil Procedure since it was organized in 1935. His appointment was presumably in recognition of his learning in this field and of the articles on "Federal Civil Procedure" which he and Professor James W. Moore, author of *Federal Practice* but then a research Fellow at the Yale Law School, published at 44 YALE L. J. 387, 1291. These articles pointed out the opportunities available to this Court by reason of the Act of June 19, 1934, 48 Stat. 1064, 28 U. S. C. §§723b, 723c (Code of 1911), authorizing it to promulgate rules of procedure in civil cases. It seems a little too much to think that Judge Clark did not know what he was doing in the way of federal court procedure.

POINT X.

If and to the extent that the order of the President should embody an error of law, it is subject to judicial review. The Canal Zone Code, taken together with the Administrative Procedure Act, differs from the Tariff Act and the Civil Aeronautics Act. *Shaughnessy* v. *Pedreiro*, 349 U. S. 48, 51.

We do not regard this point as at issue at this stage of the case and we would expect that after defendant's "duty" and "the principles on which it should proceed" are "finally adjudicated" by this Court (Harlan, J., R. 261), there will be no further need for litigation. Nevertheless, we believe it appropriate to show that defendant's premise with respect to *Chicago & Southern Airlines* is untenable as to reviewability as well as to procedure.

The Section 411 proviso, read in the abstract, might be thought to have any of the following meanings:

1. That the President could set any rate he chose, according to his arbitrary whim of fancy, beyond judicial review—the "unlimited delegation" of the District Judge.

We have demonstrated under Point IV that the proviso cannot have such a meaning.

2. That the President is bound to apply the law, using his own discretion with respect to what is "practicable", "appropriate" etc. as provided in Section 412 (b), but that his action is beyond judicial review.

3. That the President's action is subject to judicial review so far as errors of law are concerned.

We submit that meaning 3 must be adopted.

Section 10(a) of the Administrative Procedure Act subjects all administrative action to judicial review unless "preclude[d]."

As we established under Point IV it was the duty of the President, under the Section 411 proviso, to see to it that a tolls prescription by defendant complied with the statute and sound discretion.

To confer an approval power on an executive officer does not preclude judicial review of his action. Under Point IV we cited a number of cases in which selections of public lands were "subject to the approval of the Secretary of the Interior", and in which it was held that his power was "judicial", "to determine the lawfulness" of the selection, and "to cast upon the Secretary the duty of ascertaining whether the selector is acting within the law". His performance of that function was invariably held subject to judicial review. *Supra* pp. 109-111.

Section 10(c) provides that there shall be judicial review of "final agency action."

Most significantly, defendant said at p. 30 of its brief in the Court of Appeals:

> "The President's approval thus constitutes the 'final agency action' (cf. Shaughnessy *v.* Pedreiro, 349 U. S. 48, 51)."

Thus defendant, at that time, appeared to recognize that the President's approval was subject to review under the Administrative Procedure Act, especially by its immediately subsequent citation of *Shaughnessy*.

In *Shaughnessy* v. *Pedreiro*, 349 U. S. 48, this Court considered the provision of the Immigration and Nationality Act of 1952, 66 Stat. 281, 8 U. S. C. §1101, that deportation orders of the Attorney General shall be "final". The

Court held the orders subject to judicial review, saying at p. 51:

> "Such a restrictive construction of the finality provision of the present Immigration Act would run counter to §10 and §12 of the Administrative Procedure Act. Their purpose was to remove obstacles to judicial review of agency action under subsequently enacted statutes like the 1952 Immigration Act. And as the Court said in the Heikkila case, the Procedure Act is to be given a 'hospitable' interpretation. In that case the Court also referred to ambiguity in the provision making deportation orders of the Attorney General 'final'. It is more in harmony with the generous review provisions of the Administrative Procedure Act to construe the ambiguous word 'final' in the 1952 Immigration Act as referring to finality in administrative procedure rather than as cutting off the right of judicial review in whole or in part . . ."

Plaintiffs submit that the enactment of the Administrative Procedure Act and the difference in the subject-matter and the statutory schemes distinguish the Act of 1950 from the Tariff Act, as construed in *United States* v. *George S. Bush & Co.*, 310 U. S. 371, and the Civil Aeronautics Act as construed in *Chicago & Southern Airlines* v. *Waterman SS. Corp.*, 333 U. S. 103, holding the action of the President not subject to judicial review.

We shall now consider the objections to such review more or less articulated at various times by defendant:

> (a) That there is something peculiar and exalted concerning the office of the President which precludes judicial consideration of his acts;
>
> (b) That the words "final and conclusive" indicate a Congressional intent that the courts should not correct his errors of law;

(c) That the President's absence from this suit precludes such correction.

(a) *The courts may consider the lawfulness of the acts of the President.*

In *U. S. Sugar Equalization Board* v. *P. De Ronde & Co.*, 7 F. 2d 981 (C. A. 3d), the Court regarded it as especially appropriate that the courts review the acts of the President for errors of law. The case concerned the alleged failure of the President to comply with "Public Resolution No. 89, 67th Congress", by which the President had been "authorized to require" the Board to take over a certain transaction of De Ronde. The President construed the Resolution as permissive, not mandatory. The Court, holding the Resolution mandatory, upheld an injunction against the Board which had the effect of forcing the President to direct the Board to take over the transaction. The Court said at pp. 986-987:

> "It may be that President Harding thought that this resolution was permissive, but the President, like the Secretary of the Treasury, or any other executive or administrative officer has to construe every act passed by Congress to be enforced by him. Such construction is not final and may be judicially reviewed at the instance of those injuriously affected thereby, and if this resolution is finally declared to be mandatory, its mandates will doubtless be carried out, for 'it is always to be presumed that a public officer will do whenever called on what the law requires of him'. Hoff *v.* Jasper County, 110 U. S. 53. *And this is especially true of the President of the United States,* whose constitutional duty it is 'to take care that the laws be faithfully executed'."

Other cases to the same effect include *Little* v. *Barreme*, 2 Cranch, 170, in which this Court held a naval officer liable

in tort for the seizure of a ship, although he had acted in compliance with an order of the President, the officer's Commander-in-Chief, that order being unlawful; *Francis* v. *Francis*, 203 U. S. 233, in which this Court held void a condition inserted by the President in a land grant because the condition was not authorized by law; *Humphrey's Executor* v. *United States*, 295 U. S. 602, in which this Court held unlawful the President's removal from office of a member of the Federal Trade Commission; and *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, in which this Court held unlawful the defendant's seizure of certain steel mills pursuant to the order of the President, because that order was not authorized by law.

(b) The words "final and conclusive" in the Section 411 proviso do not bar judicial review.

In *Rubinstein* v. *Brownell*, 206 F. 2d 449 (C. A. D. C.), the Court considered this question and said at p. 453:

> "In dealing with other sorts of legislation, the Supreme Court had repeatedly held that the word 'final' does not necessarily exclude, or limit to habeas corpus, judicial review of administrative action. Estep *v.* United States, 327 U. S. 114, is an example. Accordingly it had become common before 1952 for Congress, when it wished to preclude or restrict judicial review, to do so by express language and not to rely on the word 'final'. Section 601 (e) of the Revenue Act of 1936, 49 Stat. 1740, provided that 'The determination of the Commissioner of Internal Revenue with respect to any refund under this section shall be final and no court shall have jurisdiction to review such determination'. A 1940 amendment of the World War Veterans Act of 1924, 54 Stat. 1197, 38 U. S. C. §11a-2, provided that 'the decisions of the Administrator of Veterans' Affairs on any question of law or fact concerning a claim for benefits * * * shall be final and conclusive and no other official or

> any court of the United States shall have power or jurisdiction to review any such decisions'. A 1941 Excess Profits Tax amendment, 55 Stat. 26, provided that certain determinations of liability by the Board of Tax Appeals (now the Tax Court of the United States) 'shall not be reviewed or redetermined by any court or agency except the Board' " . . .

In the *Rubinstein* case the Court asserted that "the Supreme Court had repeatedly held that the word 'final' does not necessarily exclude, or limit to habeas corpus, judicial review of administrative action," citing the *Estep* case "as an example" (*supra* p. 178).

Another example is of special interest here because it concerned a statute using the same expression as the Section 411 proviso, viz., "final *and conclusive*".

United States v. *Williams*, 278 U. S. 255, and *Reynolds* v. *United States*, 292 U. S. 443, involved determinations made under §310 of the Adjusted Compensation Act, 43 Stat. 121, as amended 44 Stat. 826, as follows (278 U. S. 257):

> "The decisions of the Secretary of War, the Secretary of the Navy, and the Director, on all matters within their respective jurisdictions under the provisions of this Act (except the duties vested in them by Title VII) shall be *final and conclusive*".

In *Williams* this Court sustained the Director because his decision was not "wholly without evidential support or wholly dependent upon a question of law or clearly arbitrary or capricious".

On the other hand in *Reynolds* this Court held that the claimant was entitled to relief saying at p. 446:

> "The undisputed and indisputable facts bring the veteran within the requirements of the statute. Undoubtedly, therefore, as matter of law, he was entitled to the hospital facilities of St. Elizabeths,

and if timely application had been made to the director of the bureau, a refusal upon his part to order the hospitalization would have been wholly without evidentiary support, clearly arbitrary and capricious, and would not, upon well settled principles, have concluded the courts" . . .

(c) *The President's absence from a suit against defendant does not preclude the correction of his errors of law in the exercise of his approval power under the Section 411 proviso.*

This Court has long taken the view that subordinate officers carrying out the orders of higher authority may be sued respecting those orders if "the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court." *Williams* v. *Fanning*, 332 U. S. 490, 494 (local postmaster subject to suit to enjoin order of Postmaster-General); *Hynes* v. *Grimes Packing Co.*, 337 U. S. 86 (local director of Wild Life Service subject to suit to enjoin enforcement of regulation of the Secretary of the Interior); *Shaughnessy* v. *Pedreiro*, 349 U. S. 48 (local director of immigration subject to suit to enjoin deportation order of Commissioner of Immigration).

In *Youngstown Sheet & Tube Co.* v. *Sawyer*, the District Court expressly applied this doctrine in a suit against the Secretary of Commerce carrying out an order of the President. 103 F. Supp. 569, 576. This Court affirmed the District Court's injunction without discussion of the point. 343 U. S. 579.

In the cases cited *infra* p. 194, to which the Secretary of the Interior was not a party, this Court held erroneous orders of the Secretary of the Interior respecting land grants subject to his approval.

Obviously relief can be afforded these plaintiffs by a "decree expending itself" on defendant.

PART THREE.

The defendant is liable for overcharges.

I. Once it is determined that under the Section 411 proviso it is the President's duty to enforce the law and not his privilege to disregard the law, there is an adequate basis for assessing damages.

II. Congress showed its intent that defendant make reparation for overcharges by imposing on defendant, a corporation fully subject to suit, a duty violation of which gives rise to a cause of action for damages. Doctrines applicable to regulatory agencies are not available to defendant; the President is not a necessary party.

III. Failures to provide relief for excessive tolls collected in the past would reward concealment and obstruction, frustrate Congressional and Treaty intent, and give an appearance of hypocrisy to professions by the United States that it favors the rule of law for international waterways.

POINT I.

Once it is determined that under the Section 411 proviso it is the President's duty to enforce the law and not his privilege to disregard the law, there is an adequate basis for assessing damages.

The difficulty found by the Court of Appeals in fixing damages was that "there is no way of knowing whether or not the President would have approved" tolls fixed by defendant (R. 257). Defendant repeats this argument (Brief, 145), saying that the President must "take into account matters of national transportation policy, foreign relations, local and world-wide trade, and national defense." We have demonstrated, Part Two, Point IV, *supra* pp. 102-122, that the Act of 1950 established a tolls policy which it was the duty of the President to enforce, not his

privilege to disregard. The calculation of the amount of tolls collected from plaintiffs in excess of the statutory rate is not difficult or is, at least, within permissible limits.

The toll rate necessary to pay the cost of Canal operation can be readily ascertained—in fact, it has been ascertained by the General Accounting Office. Defendant intimates that it disputes some of GAO's allocations. What defendant disputes plaintiffs do not know because defendant has never made public its own allocations of general corporate expense. In any event defendant tenders no issue, and plaintiffs can conceive none, that could not be readily solved in accordance with accepted legal principles.

The only impediment at all is that the statute contemplates that tolls be fixed prospectively while a court would determine damages retrospectively. However, that is true in all rate cases.

In *Atlantic Coast Line* v. *North Carolina Commission*, 206 U. S. 1, this Court, at p. 26, spoke of the "flexible limit of judgment which belongs to the power to fix rates." In other words, rate-making always involves a certain amount of discretion—there is always a certain leeway in determining what is "reasonable." But that in no way precludes judicial scrutiny of the result.

When such scrutiny ascertains that the rate charged exceeded the lawful reasonable rate, damages are allowed in the amount of the excess or "overcharge," despite the fact that by law the wrongdoer had the power and duty to fix rates prospectively. In the interests of brevity we have eliminated a demonstration of this proposition contained in a draft of this brief prepared before receipt of defendant's brief, as defendant's brief appears to concede the proposition (Brief, 139). Cf. *infra* p. 186.

Certainly the situation is well within the rule laid down by this Court in *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 563:

> "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise."

This rule has been followed in cases requiring far more speculation than is necessary here. Cf. *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251.

The courts have the capacity to act. Because this Court has held that the courts are not fitted to select air carriers for foreign routes, on secret data involving foreign policy and national defense, defendant seems to think the courts have lost that ability which they have had for centuries to deal with rates (Brief, 145-146).

Not only did the courts determine rates at common law; subsequently they enforced statutory rates, *supra* p. 142. The time came when the determination of the reasonableness of rates against the claim that a fair return was not provided became familiar judicial business. The lower federal courts were largely barred from such litigation by the Act of May 14, 1934, 48 Stat. 775, now 28 U. S. C. §1342, but it continues in the state courts.

The suggestion that the courts are unable to enforce a rate statute as specific as Section 412, involving only a single distance, a single service and almost only one class of traffic, is not persuasive.

POINT II.

Congress showed its intent that defendant make reparation for overcharges by imposing on defendant, a corporation fully subject to suit, a duty violation of which gives rise to a cause of action for damages. Doctrines applicable to regulatory agencies are not available to defendant; the President is not a necessary party.

The Court below dismissed the claim for damages upon the further ground that "we find no evidence of a congressional intent to allow recovery of overcharges" (R. 257).

Plaintiffs submit that Congress by creating between ship-owners and defendant legal relationships under which well-settled principles accord a right of damages when duty is breached showed an intent to allow such recovery.

That public corporations subject to suit have all the liabilities of private corporations, except as to execution, has been settled by numerous decisions of this Court. *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381; *F. H. A.* v. *Burr*, 309 U. S. 242; *R. F. C.* v. *Menihan Corp.*, 312 U. S. 81.

[Plaintiffs recognize that the consent by the United States to suit respecting defendant's affairs does not carry with it a consent to execution. *Dexter & Carpenter* v. *Kunglig Jarnvagsstyrelsen;* 43 F. 2d 705 (C. A. 2d). At present all that plaintiffs ask respecting damages is that this Court hold that the complaint states a cause of action.]

With respect to defendant, we know that the 81st Congress specifically intended, by adoption of the Act of July 16, 1949, that it "should be subject to suit on *all* claims, tort as well as contract, in the *same* manner as any *private* corporation." *Supra* pp. 90-91.

A little more than a year later the same Congress, by the Act of September 26, 1950, authorized the transfer of the Canal to defendant, an "agency" thus made subject to suit "like any private corporation," imposed upon defendant the duty to prescribe tolls according to the Section 412 formula, and made that duty "effective" upon the transfer, an event that occurred July 1, 1951 (16 F. R. 6333) (Sections 10, 11, 12 and 14 of the Act of 1950, Appendix A, 5a-8a).

Also, by Section 12 of the Act of 1950 enacting Section 412(d), Congress incorporated in the laws of the United States applicable to defendant the provision of the Hay-Pauncefote Treaty requiring that "the Canal shall be free and open to the vessels of commerce" "of all nations" without "discrimination" and at "just and equitable" tolls and defined what was "just and equitable" by the Section 412 formula.

By simultaneously providing in the same Act for the transfer of the Canal to defendant, a corporation fully subject to suit, the nation's duty under the Treaty, whatever it might continue to be as a matter of international negotiation, arbitration or litigation, became enforceable as a matter of municipal law by suit against defendant in the courts of the United States.

The obligation to serve all customers without discrimination and at lawful rates is the classic characteristic of the public utility in Anglo-American law. *Munn* v. *Illinois*, 94 U. S. 113. As we show *infra* violation of that duty gives rise to a cause of action for damages.

This Court has frequently held that failure to comply with a statutory duty gives rise to a cause of action in favor of those injured by that failure. *Infra* pp. 191-192.

Here the reasoning of such decisions is further buttressed by the fact that the legal relationship between plaintiffs and defendant is of a kind that historically has warranted an action for damages when duty is breached.

Nor is exception made when the rate to be fixed is subject to approval by another.

Defendant, as a corporation with a duty to fix a reasonable rate, is liable for its failure to do so. When a public utility fails to perform its duty to fix a lawful and reasonable rate, the user may recover in the courts whatever excess has been charged. The principle has been most often declared, perhaps, in railroad cases.

In *Arizona Grocery Co. v. Atchison Ry. Co.*, 284 U. S. 370, this Court declared at p. 383:

> "The exaction of unreasonable rates by a public carrier was forbidden by the common law. . . . Rates, fares, and charges were fixed by the carrier, which took its chances that in an action by the shipper these might be adjudged unreasonable and reparation be awarded."

In *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, this Court said at p. 436:

> "Without going into detail, it may not be doubted that at common law, where a carrier refused to receive goods offered for carriage except upon the payment of an unreasonable sum, the shipper had a right of action for damages."

Cf. *Heiserman* v. *Burlington, C. R. & N. Ry. Co.*, 63 Iowa, 732; *Louisville etc. Ry. Co.* v. *Wilson*, 132 Ind. 517, 526; *Peters* v. *Railroad Co.*, 42 Ohio St. 275.

As noted *supra* p. 182 the measure of damages in the carrier cases is the difference between the rate charged and a reasonable rate.

The rule is, however, applied to public utilities generally. *Salt River Canal Co.* v. *Nielsen*, 10 Ariz. 9; *City of Chicago* v. *Northwestern Co.*, 218 Ill. 50 (municipal water system); *Winchester Turnpike Co.* v. *Croxton*, 98 Ky. 739. Cf. *Forbes Boat Line* v. *Board of Commissioners*, 77 Fla. 742, holding plaintiff shipping company entitled to recover from defendant, a state agency operating a canal, tolls exacted without authority in law. At 258 U. S. 338 this Court held unconstitutional a retroactive grant of authority by the Florida legislature.

And when, as in the *Winchester* and *Heiserman* cases, *supra*, the legislature defines what is reasonable, the user may recover any excess charged over the rate thus defined.

This principle continues to the present day despite the creation of regulatory commissions with power to make reparations findings. Thus, under Section 16(2) of the Interstate Commerce Act, the Commission's reparation order is merely a condition precedent to, and evidence in, the user's suit for damages for the excess over the lawful rate. *Meeker* v. *Lehigh Valley R. Co.*, 236 U. S. 412, 430; *Lewis Co.* v. *Southern Pacific Co.*, 283 U. S. 654, 660-661. Only the courts definitively adjudge relief.

The liability exists although a rate prescribed by defendant was not finally effective *per se*; the Section 411 requirements that the President approve and that the existing toll rate continue until changed according to law provide no defense. Defendant tries to hide behind the President—a somewhat presumptuous argument as defendant, unlawfully failing to act, deprived the President of an opportunity to function.

In any event the argument does not have force. When a rate is excessive failure to prescribe a new and lawful rate calls for damages, despite the fact that the new rate is subject to approval by an independent authority.

Thus under the Interstate Commerce Act a rate prescribed and filed by a carrier is subject to the approval of the Commission, Section 15(7), in the same way that defendant's rates are subject to the approval of the President.

In *News Syndicate Co.* v. *New York Central R. Co.*, 275 U. S. 179, this Court considered the carrier's failure, as to newsprint shipped from Ontario to New York City, to establish a reasonable rate on that part of the trip from the international boundary to New York. Holding the carrier liable for the damages thereby sustained, the Court said at p. 187:

> "It was the duty of defendants in error to establish just and reasonable rates for that service [from the boundary to New York]. . . Their breach of the statutory duty was a proximate cause of the losses complained of."

In *Lewis Co.* v. *Southern Pacific Co.*, 283 U. S. 654, another international rate case, this Court, holding the carrier liable, said at p. 663 that "the burden was upon the carrier to bring forward evidence that a rate therefor had been established as required by the Act."

In neither of these cases was the carrier relieved of liability for its failure to establish a lawful rate, although any rate so established was subject to the approval of the Commission.

These cases are merely illustrative. It is obvious that under the procedures of the Interstate Commerce Act any reparation case necessarily involves a breach of duty to

establish a lawful rate, and of course all rates are subject to the approval of the Commission.

The proviso that the existing toll continue until changed according to law is similarly not a defense. That proviso merely specifies what the defendant must collect; it does not immunize a failure to establish a new and reasonable rate if circumstances call for its establishment.

Again the analogy to the Interstate Commerce Act is instructive. Under that Act the carrier is bound to charge the tariff rate, yet the carrier is not thereby exempt from liability if, due to its fault, the tariff rate is not a reasonable one. Hence a distinction is drawn between a "lawful" rate, which is the reasonable rate, the rate that should be charged, and the "legal" rate, which is the tariff rate and must be collected by the carrier. Damages have been awarded against carriers for charging the "legal" rate when it was excessive, although it was the rate required by law to be charged. In such a case, *L. & N. R. R. Co.* v. *Sloss-Sheffield Co.*, 269 U. S. 217, in upholding a reparation award, this Court noted at p. 234:

> "The tariff rate, although unlawful because excessive, was as between shipper and carrier, the only legal rate."

This principle is necessarily involved in all—or practically all—reparation cases, as the carrier necessarily charges the tariff, "legal" rate. But to protect the shipper it is necessary that reparations be awarded when that tariff rate is excessive. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 442; *Arkansas Fuel Co.* v. *C. M. & St. P. Ry. Co.*, 16 I. C. C. 95, 97; *Sloss-Sheffield Steel & Iron Co.* v. *L. & N. R. Co.*, 51 I. C. C. 635, 643, 648.

Defendant, as a public body with a duty to act, is liable for its failure to do so, although its action was not finally effective *per se*. It is well-settled that the citizen may recover damages suffered by reason of the failure of a public officer or body to perform a statutory duty. *Amy* v. *Supervisors*, 11 Wall. 136, 138; *Tracy* v. *Swartout*, 10 Pet. 79, 93; cf. *Robinson* v. *Chamberlain*, 49 N. Y. 389, 390, 394.

More particularly, a citizen entitled to mandatory relief against a public officer also receives damages caused by delay in the performance of that duty. *Dow* v. *Humbert*, 91 U. S. 294, specifically approving *People* v. *Supervisors*, 28 N. Y. 112.

If the courts deem it proper that a public officer respond individually, from his personal means, for damages suffered by reason of his failure to perform a statutory duty, how much more appropriate that damages be paid by a public body which has enriched itself to the extent of millions of dollars by such failure.

That prescription was subject to the approval of the President is not a defense. In most cases the public officer required to pay damages had full control of the administrative process in question. At least one case, however, relates to a public officer who did not have final power, but like defendant here, had the duty of initial action, final action to be taken by another agency. He was held liable. *Hupe* v. *Sommer*, 88 Kan. 561, was a suit by a contractor against a city official who had wrongfully refused to certify to the county clerk that the work under the contract had been satisfactorily completed. Under the statute the county clerk, upon receiving a certificate of completion, took final action in respect of payment. The Court said at pp. 564-565:

> "The petition also alleges that the defendant failed and refused to proceed as the law provides

> for the collection of the money and the payment of the plaintiff, and *failed and refused to put into operation the machinery provided by law* for the collection of taxes and moneys. . . . If the defendant, without sufficient excuse, refused to perform [his duties], *he inflicted a wrong upon the plaintiff; and should be liable for whatever loss was thereby occasioned.*"

This Court Has Recognized That Express Provision for Damages Is Not Necessary.

The principle of the public utility rate and administrative law cases that breach of duty gives rise to an action for damages despite the absence of express statutory provision for damages has been recognized by this Court in similar cases.

In *Texas & Pacific Ry. Co.* v. *Rigsby,* 241 U. S. 33, the Court considered a suit for damages suffered in an accident caused by defendant's failure to comply with the Safety Appliance Act. The Court said at p. 39:

> "A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the *damages* from the party in default is implied . . ."

In *Steele* v. *L. & N. R. Co.,* 323 U. S. 192, the Court considered a suit by several Negroes against a collective bargaining agent to forbid discrimination against them in the agent's negotiations with the employer. The agent had been chosen and functioned under the Railway Labor Act. The Court construed the Act to require the agent to act without discrimination. The Court then addressed itself to the contention that the Act made no provision for judicial relief and said at p. 207:

> "That right (that the agent act without discrimination) would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation and which it is their duty to give in cases in which they have jurisdiction . . . . We conclude that the duty which the statute imposes on a union representative of a craft to represent the interests of all its members stands on no different footing and that the statute contemplates resort to the usual judicial remedies of *injunction and award of damages* when appropriate for breach of that duty."

In view of the international aspects of this case, it is relevant that the Permanent Court of International Justice has taken the same view that breach of duty gives to damages. That Court has observed that "it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation." *Chorzow Factory Case*, P. C. I. J. Series A No. 17, p. 29, an often cited case.

The Court below relied on *Montana-Dakota Co.* v. *Public Service Co.*, 341 U. S. 246, a five-to-four decision of this Court. But in that case the plaintiff had brought suit under the Federal Power Act, a statute which granted a third party regulatory agency, the Federal Power Commission, the power to prescribe future rates, but consciously and deliberately withheld the power to grant reparations. A majority of the Court concluded that under these circumstances a complaint alleging excess rates in the past did not state a cause of action under the Federal Power Act. (It is to be noted, however, that even the Federal Power Act permitted damages back to the institution of rate proceedings.) The complaint also alleged that the rates were fraudulent, but the Court found no

federal jurisdiction over that aspect of plaintiff's grievance. But here the case concerns a tort committed by the defendant of which the District Court, as a federal court, unquestionably had jurisdiction. 28 U. S. C. §1331, *supra* pp. 86-89.

Defendant may not avail itself of doctrines applicable to regulatory agencies. Defendant's Brief (141-142) cites various cases involving regulatory agencies for the proposition that the courts can not grant relief for excess charges collected in the past "where an administrative agency has been entrusted with the determination of rates". Defendant deduces that it is immune from liability for its unlawful failure to prescribe tolls.

But the cases which defendant cites involve agencies with the power to regulate other people's rates. Defendant has no such power; in so far as relevant here defendant has only the power "to maintain and operate the Panama Canal." Section 9 of the Act of 1950; Defendant's Brief, 166. Defendant has been entrusted only with the power to determine its own rates. Corporations with only that power have no immunity with respect to their failure to prescribe lawful rates.

In passing it might be said that in this connection defendant again misstates the doctrine of *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 246. As the entire premise of defendant's argument is false we do not stop to correct that misstatement.

The President is not a necessary party. Defendant suggests that because tolls prescriptions are subject to the approval of the President he is a necessary party in respect of the claim for damages.

Plaintiffs are suing for the tort committed by defendant for breach of its duty to prescribe tolls, a breach by reason

of which plaintiffs have been deprived of the benefits of the statute and defendant has wrongfully enriched itself to the extent of many millions of dollars.

Plaintiffs seek no recovery from the President who has done nothing wrong and has been deprived of an opportunity to function by defendant's unlawful failure to act.

Under such circumstances the President is no more a necessary party than is the Interstate Commerce Commission in actions brought by shippers for damages caused by the failure of carriers to establish a lawful rate, such a rate, when filed, being subject to the approval of the Commission.

[A finding by the Commission is a prerequisite of such a suit, it is true, but that is because the purpose of the Interstate Commerce Act was to achieve uniformity of rates; *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 246; cf. *United States* v. *Western Pacific R. Co.*, 352 U. S. 59. The Act of 1950 had no such purpose, and uniformity is no problem in connection with Panama Canal rates.]

Again, to refer to cases involving public property, in which it appeared that Congress had authorized land grants subject to the approval of the Secretary of the Interior, the courts have regularly adjudicated controversies between rival claimants in suits to which the Secretary was not a party. The decisions in such cases have often turned on the ground that the Secretary had exercised his review power erroneously as a matter of law. *St. Paul & Sioux City R. R. Co.* v. *Winona & St. Peter. R. R. Co.*, 112 U. S. 720; *Daniels* v. *Wagner*, 237 U. S. 547; cf. *California* v. *Deseret Water Co.*, 243 U. S. 415.

The argument *supra* p. 180 respecting the necessity of the President as a party in review proceedings also applies here.

POINT III.

Failure to provide relief for excessive tolls collected in the past would reward concealment and obstruction, frustrate Congressional and Treaty intent, and give an appearance of hypocrisy to professions by the United States that it favors the rule of law for international waterways.

Here the courts have, by hypothesis, adjudicated that defendant acted unlawfully in its obstinate refusal to fix tolls on the basis of Canal operations; moreover, defendant apparently realized that such was its legal duty and received frequent warnings to that effect, and defendant long aided its unlawful refusal by concealment effected by "ambiguous bookkeeping" (R. 249).

Almost seven years have passed since the new tolls policy became "effective" on July 1, 1951 according to the Congressional declaration (Section 14 of the Act of 1950; Appendix A, 8a). At least six months must pass after this Court's decision before a new rate can go into effect.

Almost a year ago the Court of Appeals ordered defendant to proceed; but this Court stayed the order because of the foreign relations impact of tolls (R. 261).

If there is to be no liability for past damages, then through the delay seemingly inherent in this type of litigation and its long hidden, persistent disobedience, defendant gains to the extent of tens of millions of dollars and the Congressional intent that the formula take effect July 1, 1951 is frustrated.

The United States is obligated by Treaty to charge just and equitable tolls. Congress by the Act of 1950 defined tolls in accordance with that Treaty. Part One, Point II,

supra pp. 42-43; brief *amicus curiae* of the United Kingdom. If damages are not awarded that Treaty obligation has not been met.

Our highest officials have in the last years urged forcefully and well that international waterways be governed by the rule of law and not by arbitrary executive power. Unfortunately foreign nations are not likely to give full weight to these fine pronouncements, reminiscent as they are of declarations made respecting Panama before we built the Canal, if our country permits a Government corporation suable on all claims arising under the laws and treaties of the United States to retain vast sums judicially declared to have been unlawfully levied upon the commerce of the world for many years.

Conclusion.

The summary judgment granted by the Court of Appeals should be affirmed. So much of its decision as denies the claim for damages should be reversed.

March 22, 1958.

Respectfully submitted,

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APPENDIX A.

Statutes Involved.

Act of June 29, 1948 (62 Stat. 1075-1077):

Section 2 of the Act of June 29, 1948, by enacting Section 245, Title 2, Canal Zone Code, declared defendant to be an "agency and instrumentality of the United States."

Section 2, by enacting Section 245, also provided that:

> "Within the meaning of the laws of the United States relating to venue in civil actions, the corporation shall be deemed to be an inhabitant both of the southern judicial district of New York and of the Canal Zone."

Section 2 also enacted Section 246 as follows:

> "246. INVESTMENT OF THE UNITED STATES.—(a) As of the beginning of business July 1, 1948, the corporation shall issue to the United States, and deliver to the Secretary of the Treasury, a receipt for $1 acknowledging the transfer to the corporation, under the provisions of section 251 of this title, of the net assets of the Panama Railroad Company, hereinafter referred to as the 'New York company', a corporation created by an act of the Legislature of the State of New York passed on April 7, 1849, as amended by an act of that legislature passed on April 12, 1855, and which is wholly owned by the United States, and such receipt shall be evidence of the ownership of the corporation by the United States of America. In its capacity as owner of the corporation, the United States shall be represented by the President of the United States or such officer of the

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United States as may be designated by him, hereinafter referred to as the 'stockholder'.

"(b) The amount of the receipt (referred to in paragraph (a) above) shall be increased by subsequent additional direct investments of the United States, in excess of repayments to the Treasury and extraordinary expenditures and losses applicable as offsets to such investments under the provisions of paragraph (d) of this section, due to (1) funds advanced to the corporation from the Treasury within such appropriations by the Congress as may from time to time be made to meet increased capital needs, and (2) transfers to the corporation from other Government agencies (or, conversely, decreased by transfers from the corporation to other Government agencies), pursuant to applicable provisions of law, of business enterprises, facilities, appurtenances, and other assets, less liabilities assumed in connection with such transfers. Transfers of properties and other assets from or to other Government agencies under clause (2) above shall be at such appropriate amount or amounts as shall be agreed upon between the corporation and the agencies concerned and approved by the Director of the Bureau of the Budget, and in the determination thereof due consideration shall be given to the cost and probable earning power of the transferred assets, or usable value to the transferee if clearly less than cost, and adequate provisions made for depreciation of properties and equipment, obsolete or otherwise unusable inventories, and other reasonably determinable shrinkages in values, and, insofar as practicable, there shall be excluded from such amount any por-

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tion of the value of the transferred property which is properly allocable to national defense. The board of directors shall certify to the Secretary of the Treasury the amount of each such transfer, the amount of any accumulated repayments to the Treasury or extraordinary expenditures or losses applicable as offsets to the amount of such transfer under the provisions of paragraph (d) of this section, and the effective date of the transfer.

"(c) In order to reimburse the Treasury, as nearly as possible, for the interest cost of the funds or other assets directly invested in the corporation, the corporation shall pay interest to the Treasury, at least annually, on the net direct investment of the Government in the corporation, as defined in paragraphs (a) and (b) of this section, and shown by the receipt described therein, at a rate or rates determined by the Secretary of the Treasury as required to reimburse the Treasury for its cost.

"(d) The corporation shall account for its surplus as follows: (1) The total net income from operations from and after 1904 (when the Government acquired control of the New York company), plus the undistributed net income prior to 1904, less (2) payments to the Treasury as dividends from and after 1904, not applied as offsets to direct capital contributions as described below, and less (3) extraordinary expenditures or losses incurred through directives based on national policy and not related to the operations of the corporation, not reimbursed through specific appropriations by the Congress, and not applied as offsets to direct capital contributions as described below. The corporation shall not be

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required to pay interest to the Treasury on any part of its surplus, as above defined."

Section 2, by enacting Section 247, declared defendant to be a corporation which "may sue and be sued in its corporate name."

Section 2 also enacted Section 253 as follows:

"253. PAYMENT OF EXCESS FUNDS INTO THE TREASURY. The board of directors shall have the power and duty to appraise, at least annually, its necessary working capital requirements, together with reasonable foreseeable requirements for authorized plant replacement and expansion, and to pay into the Treasury as dividends the amount of funds in excess thereof. Such dividends shall be treated by the Treasury as miscellaneous receipts, but shall be treated on the books of the corporation as applicable to reduction of past or future direct Government capital contributions (as provided in section 246(d) of this title) in determining the base for interest payments required under section 246(c)."

Act of September 26, 1950 (64 Stat. 1038-1043):

SEC. 2. (a) Except as otherwise provided in, or where inconsistent with, the provisions of this Act—

(1) the terms 'the Panama Canal,' 'the Canal,' and 'the Canal authorities,' wherever appearing in the statutes of the United States and having reference, prospectively, to the agency heretofore known by those names, are amended to read 'the Canal Zone Government'; and

(2) the term 'the Panama Railroad Company' wherever appearing in the statutes of the United

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States and having reference, prospectively, to the corporation heretofore known by that name, is amended to read 'the Panama Canal Company'.

* * * * * * * *

SEC. 10. Article 3 of chapter 12 of title 2, Canal Zone Code, as added by the Act of June 29, 1948, is amended by renumbering sections 255 and 256 of said title 2 as sections 257 and 258, respectively, and by adding, in said article 3, two new sections numbered 255 and 256 and reading as follows: * * *

"256. AUTHORIZATION FOR TRANSFER OF PANAMA CANAL TO CORPORATION.—The President is hereby authorized to transfer to the corporation the Panama Canal, together with the facilities and appurtenances related thereto, and any or all of the facilities and appurtenances heretofore maintained and operated by the Panama Canal under authority of section 51 of title 2 of the Canal Zone Code, as amended by section 2 of the Act of August 12, 1949 (ch. 422, 63 Stat. 601), and all or so much as he may determine to be necessary of the personnel, property, records, related assets, contracts, obligations, and liabilities of or appertaining to the said Canal and the aforesaid facilities or appurtenances, and such transfer shall be deemed to have been accepted and assumed by the corporation without the necessity of any act or acts on the part of the corporation except as otherwise stipulated in the provisions of section 246 of this title."

SEC. 11. Section 411 of title 2 of the Canal Zone Code is amended to read as follows:

"411. AUTHORITY TO PRESCRIBE MEASUREMENT RULES AND TOLLS.—The Panama Canal Company is authorized to prescribe and from time to time change (1) the rules for

the measurement of vessels for the Panama Canal, and (2), subject to the provisions of the section next following, the tolls that shall be levied for the use of the Panama Canal: *Provided, however,* That the rules of measurement, and the rates of tolls, prevailing on the effective date of this amended section shall continue in effect until changed as provided in this section: *Provided further,* That the said corporation shall give six months' notice, by publication in the Federal Register, of any and all proposed changes in basic rules of measurement and of any and all proposed changes in rates of tolls, during which period a public hearing shall be conducted: *And provided further,* That changes in basic rules of measurement and changes in rates of tolls shall be subject to, and shall take effect upon, the approval of the President of the United States, whose action in such matter shall be final and conclusive."

SEC. 12. Section 412 of title 2 of the Canal Zone Code, as amended by the Act of August 24, 1937 (ch. 752, 50 Stat. 750), is amended to read as follows:

"412. BASES OF TOLLS—(a) Tolls on merchant vessels, army and navy transports, colliers, tankers, hospital ships, supply ships, and yachts shall be based on net vessel-tons of one hundred cubic feet each of actual earning capacity determined in accordance with the rules for the measurement of vessels for the Panama Canal, and tolls on other floating craft shall be based on displacement tonnage. The rate of tolls on vessels in ballast without passengers or cargo may be less than the rate of tolls for vessels with passengers or cargo.

"(b) Tolls shall be prescribed at a rate or rates calculated to cover, as nearly as practicable, all costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto, including

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interest and depreciation, and an appropriate share of the net costs of operation of the agency known as the Canal Zone Government. In the determination of such appropriate share, substantial weight shall be given to the ratio of the estimated gross revenues from tolls to the estimated total gross revenues of the said corporation exclusive of the cost of commodities resold, and exclusive of revenues arising from transactions within the said corporation or from transactions with the Canal Zone Government.

"(c) Vessels operated by the United States, including warships, naval tenders, colliers, tankers, transports, hospital ships, and other vessels owned or chartered by the United States for transporting troops or supplies, may in the discretion of the President of the United States be required to pay tolls. In the event, however, that such vessels are not required to pay tolls, the tolls thereon shall nevertheless be computed and the amounts thereof shall be treated as revenues of the Panama Canal Company for the purpose of prescribing the rates of tolls, and shall be offset against the obligations of the said corporation under paragraphs (c) and (e) of section 246 of this title, as amended.

"(d) The levy of tolls is subject to the provisions of section 1 of article III of the treaty between the United States of America and Great Britain concluded on November 18, 1901, of articles XVIII and XIX of the convention between the United States of America and the Republic of Panama concluded on November 18, 1903, and of article I of the treaty between the United States of America and the Republic of Columbia proclaimed on March 30, 1922.

"(e) Capital investment for interest purposes shall not include any interest during construction. * * *"

* * * * * * *

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SEC. 14. Except for section 256 of title 2 of the Canal Zone Code, as added by section 10 of this Act, this Act shall take effect upon the effective date of the transfer to the corporation, pursuant to the provisions of said section 256, of the Panama Canal together with the facilities and appurtenances related thereto.

Administrative Procedure Act (5 U. S. C. §1001, 1009):

By Section 10(a) "any person suffering legal wrong because of agency action or adversely affected or aggrieved by such action within the meaning of any relevant statute" is "entitled to judicial review."

By Section 2(g) "agency action" is defined to include "failure to act."

By Section 10(b) "the form of proceeding" may be "any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction * * *) in any court of competent jurisdiction."

By Section 10(e) the Court "shall (A) compel agency action unlawfully withheld or unreasonably delayed."

Title 28, United States Code (Judicial Code), §1331:

§1331. *Federal question; amount in controversy.*

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.

Executive Order No. 10263 (16 F. R. 6333):

SECTION 1. There are hereby transferred to the Panama Railroad Company, a corporate agency and instru-

mentality of the United States which upon the effective date of this order shall, pursuant to the said act of September 26, 1950, be known as the Panama Canal Company, (a) the Panama Canal (the waterway), together with all the facilities, buildings, structures, and improvements related thereto, and (b) all other facilities, buildings, structures, and improvements whatsoever now maintained and operated by The Panama Canal, an independent agency of the United States which upon the effective date of this order shall, pursuant to the said act of September 26, 1950, be known as the Canal Zone Government: *Provided, however,* that there are excepted from such transfer the following-described facilities, buildings, structures, and improvements, situated on the Isthmus of Panama, which shall be for use and administration by the agency which upon the effective date of this order shall, pursuant to the said act of September 26, 1950, be known as the Canal Zone Government: . . .

Sec. 8. This order shall become effective on July 1, 1951.

APPENDIX B.

Prior Statutes Providing for the Prescription of Panama Canal Tolls.

There follow the successive statutes relating to the prescription of Panama Canal tolls. This historical review demonstrates a pattern by which the President was designated to prescribe tolls, but commanded to do so in accordance with a defined policy, a policy which afforded some administrative discretion.

Act of August 24, 1912 (37 Stat. 560, 562-3).

SECTION 5. That the President is hereby authorized to prescribe and from time to time change the tolls that shall be levied by the Government of the United States for the use of the Panama Canal: *Provided,* That no tolls, when prescribed as above, shall be changed, unless six months' notice thereof shall have been given by the President by proclamation. No tolls shall be levied upon vessels engaged in the coastwise trade of the United States * * *

Tolls may be based upon gross or net registered tonnage, displacement tonnage, or otherwise, and may be based on one form of tonnage for warships and another for ships of commerce. The rate of tolls may be lower upon vessels in ballast than upon vessels carrying passengers or cargo. When based upon net registered tonnage for ships of commerce the tolls shall not exceed one dollar and twenty-five cents per net registered ton, nor be less, other than for vessels of the United States and its citizens, than the estimated proportionate cost of the actual maintenance and operation of the canal, subject, however, to the provisions of article nineteen of the convention between the United States and the Republic of Panama, entered into November eighteenth, nineteen hundred and three. If the tolls shall not be based upon net registered tonnage, they shall not exceed the equivalent of one dollar and twenty-five cents

per net registered ton as nearly as the same may be determined, nor be less than the equivalent of seventy-five cents per net registered ton. The toll for each passenger shall not be more than one dollar and fifty cents.

Act of June 15, 1914 (38 Stat. 385-6).

SECTION 1. That the second sentence in section five of the Act entitled "An Act to provide for the opening, maintenance, protection, and operation of the Panama Canal, and the sanitation and government of the Canal Zone," approved August twenty-fourth, nineteen hundred and twelve, which reads as follows: "No tolls shall be levied upon vessels engaged in the coastwise trade of the United States," be, and the same is hereby, repealed.

SECTION 2. That the third sentence of the third paragraph of said section of said Act be so amended as to read as follows: "When based upon net registered tonnage for ships of commerce the tolls shall not exceed $1.25 per net registered ton, nor be less than 75 cents per net registered ton, subject, however, to the provisions of article nineteen of the convention between the United States and the Republic of Panama, entered into November eighteenth, nineteen hundred and three."

Act of June 19, 1934, Adopting the Canal Zone Code (48 Stat. 1122).

Title 2:

SECTION 411. *Authority of President to prescribe and change tolls.*—The President is authorized, subject to the provisions of the section next following, to prescribe and from time to time change the tolls that shall be levied by the Government of the United States for the use of the Panama

Canal, but no tolls when prescribed as above shall be changed unless six months' notice thereof is given by the President by proclamation.

SECTION 412. *Bases of tolls; maximum and minimum rates.*—Tolls may be based upon gross or net registered tonnage, displacement tonnage, or otherwise, and may be based on one form of tonnage for warships and another for ships of commerce.

The rate of tolls may be lower upon vessels in ballast than upon vessels carrying passengers or cargo.

When based upon net registered tonnage for ships of commerce the tolls shall not exceed $1.25 per net registered ton, nor be less than 75 cents per net registered ton, subject, however, to the provisions of article 19 of the convention between the United States and the Republic of Panama, entered into November 18, 1903.

If the tolls are not based upon net registered tonnage, they shall not exceed the equivalent of $1.25 per net registered ton as nearly as the same may be determined, nor be less than the equivalent of 75 cents per net registered ton.

The toll for each passenger shall not be more than $1.50.

Act of August 24, 1937, Amending Section 412, Title 2, of the Canal Zone Code (50 Stat. 750).

SECTION 412. *Bases of tolls, measurement rules; maximum and minimum rates.*—Tolls on merchant vessels, army and navy transports, colliers, hospital ships, supply ships, and yachts shall be based on net vessel-tons of one hundred cubic feet each of actual earning capacity determined in accordance with the Rules for the Measurement of Vessels for the Panama Canal prescribed by the President and as may be modified by him from time to time by proclamation, and tolls on other floating craft shall be based on displace-

ment tonnage: *Provided,* That the basic rules of measurement shall not be changed except after public hearing and six months' public notice of such change. The rate of tolls on laden vessels shall not exceed $1, nor be less than $0.75 per net vessel-ton as determined under the aforesaid rules, and on vessels in ballast without passengers or cargo the rate may be less than the rate of tolls for vessels with passengers or cargo. In addition to the tolls based on measurement or displacement tonnage, tolls may be levied on passengers at rates not to exceed $1.50 for each passenger. The levy of tolls is subject to the provisions of article XIX of the convention between the United States of America and the Republic of Panama, entered into November 18, 1903, and of article I of the treaty between the United States of America and the Republic of Colombia proclaimed March 30, 1922.

APPENDIX C.

The Report of the House Merchant Marine Committee on H. R. 8677, the Bill That Became the Act of September 26, 1950.

HOUSE OF REPRESENTATIVES

81st Congress) (Report
2d Session) (No. 2935

AUTHORIZING AND PROVIDING FOR THE MAINTENANCE AND OPERATION OF THE PANAMA CANAL BY THE PRESENT CORPORATE ADJUNCT OF THE PANAMA CANAL, AS RENAMED; TO RECONSTITUTE THE AGENCY CHARGED WITH THE CIVIL GOVERNMENT OF THE CANAL ZONE.

August 16, 1950.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed.

MR. O'TOOLE, from the Committee on Merchant Marine and Fisheries, submitted the following

REPORT

[To accompany H. R. 8677]

* * * The bill is designed to implement recommendations of the Bureau of the Budget and of the President with respect to the organization and operation of the Panama Canal.

* * * * * *

The recommendations contemplate (*a*) that in the organization of the Canal, transit and business functions should be separated from civil government functions; (*b*) that such transit and business functions should be operated on a business basis by the Panama Railroad Company, renamed the "Panama Canal Company," and that civil

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(House Merchant Marine Report)

government functions (including health and sanitation) should be performed by "the Canal Zone government"; (*c*) that tolls for commercial ships should be related to transit costs, including interest on Government investment in the Canal and a fair share of the net cost of health, sanitation, and civil government; (*d*) that free transits of Government ships should be eliminated; and (*e*) that the net appropriated cost of operation of the "Canal Zone government" should be reimbursed to the Treasury by the corporation, such reimbursement being proportionately charged to the various corporate divisions (e. g., railroad, steamship, commissary, etc.) on an equitable basis.

As reported by your committee the bill would be confined to the recommendations of the Bureau of the Budget and of the President. • • • The net cost of Canal Zone civil government would be borne from appropriations which would be reimbursed to the Treasury by the Company currently, or where necessary, over a longer period. The Company, in turn, would allocate the net cost of the Canal Zone Government against each of the corporate divisions. • • •

The bill as introduced would require that in the determination of the share of the net cost of health, sanitation, and civil government to be borne by tolls, substantial weight shall be given to the ratio of the estimated gross revenues from tolls to the estimated gross revenues of the corporation, exclusive of the cost of commodities resold and exclusive of revenues arising from transactions within the corporation or from transactions with the Canal Zone Government.

• • • • • •

Your committee is informed that the resulting allocation is expected currently to assess approximately an equal division of the expense of health, sanitation, and civil government between the transit division and other cor-

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(House Merchant Marine Report)

porate divisions. While the method of allocation contained in the bill is not the only possible method, it has the merit of simplicity and on the basis of information furnished the committee produces a reasonable and practical result.

It is generally agreed that in calculating the toll rate there should be excluded from the capital base all investment in equipment and structures, of business operations which are not directly related to operation of the Canal, all health, sanitation, and civil government facilities and equipment. Capital of each corporate division should also be reduced by a proportionate share of past net corporate repayments to the Treasury in excess of government investment pursuant to the provisions of Public Law 808 (80th Cong.). After these exclusions there would remain an item of $129,000,000 of interest which, accrued during construction of the Canal, and the amount was added to the Canal accounts by administrative determination in 1932 and represents a computation of the amount of interest compounded at 3 percent on funds appropriated between 1904 and 1920.

There is precedent for the exclusion of interest during construction from the capital investment of the Canal upon which interest is to be charged against toll revenues. Such interest during construction is not included in the capital accounts of the Tennessee Valley Authority and rates for power sold by the Authority are not computed to recover it.

Your committee has amended the bill to exclude interest during construction from the capital base for interest to be included in the tolls base. Such exclusion is recommended not only because of precedent but as a just and reasonable recognition of the defense value of the Canal, and as an offset against the operations which have been conducted and which, to some extent, will be conducted in the future, without reimbursement, for the Military Establishment or others in the interest of the United States. The amount thus excluded approximates that which was found, pursuant

Appendix C

(House Merchant Marine Report)

to direction of a special Commission appointed by the Secretary of War in 1921, to represent the capital cost of the Canal allocable to defense. Your committee notes that, for the past 30 years, there has been much argument as to whether the Canal was constructed for defense or commercial needs. Your committee is of the opinion that exclusion of interest during construction from the corporation's toll base is a reasonable recognition of the Canal's defense value, and that such exclusion will obviate argument on this issue in the future.

Your Committee believes that legislation reorganizing the Panama Canal and establishing tolls policy has long been needed. Since it will require at least a year to effect the changes proposed by the bill it is recommended that this legislation be given early consideration.

APPENDIX D.

Defendant's Income Statement for the Year Ended June 30, 1950.

The following statement is quoted from p. 18 of defendant's annual report for the year ended June 30, 1950. It has been printed in order to show that at the time the Act of 1950 was under consideration defendant was reporting its income on an activity basis. The only unallocated expenses were retirement, injury and death payments.

	1950	1949
DIVISIONAL INCOME (—LOSS):		
Commissary	$ 504,920	$ 239,988
Steamship line	90,963	224,030
Railroad	—165,346	—219,338
Harbor Terminals	305,496	146,388
Coal plant	10,119	43,784
Hotels:		
Tivoli	93,476	72,528
Washington	—84,169	—70,578
Telephone system	10,179	15,738
	765,638	452,540
Less civil service retirement fund contributions and injury and death compensation payments	230,521	226,085
Net divisional income	535,117	226,455
OTHER INCOME:		
Gain on sale of land	111,540	—
Gain on write-off of unredeemed commissary coupons	42,750	—
Interest earned	580	640
	689,987	227,095
OTHER EXPENSES:		
Accelerated depreciation of trans-Isthmian cable	—	66,740
Fire loss, La Boca commissary	69,074	—
Steamship claim settlements and other expenses applicable to prior years	63,135	—
	132,209	66,740
NET INCOME FOR YEAR	557,778	160,355

Appendix D

(Defendant's Income Statement for the Year Ended June 30, 1950.)

	1950	1949
ACCUMULATED INCOME RETAINED AT BEGINNING OF YEAR	43,656,107	51,966,009
Add:		
Portion of accumulated dividends applied to the value of assets transferred from the Panama Canal, pursuant to section 246 of the Canal Zone Code (note 1)	232,182	—
Unused portion of reserve for rehabilitation of steamships	—	82,960
	44,446,067	52,209,324
Deduct:		
Dividends paid to U. S. Treasury	1,000,000	500,000
Obsolescence of railroad roadway and track	—	7,085,159
Depreciation of certain railroad and harbor terminal properties applicable to prior years	—	943,058
Value of dairy pastures abandoned	—	25,000
	1,000,000	8,553,217
ACCUMULATED INCOME RETAINED AT END OF YEAR (exhibit 1)	$43,446,067	$43,656,107

The notes following exhibit 2 are an integral part of this statement.

APPENDIX E.

Defendant's Budget Program for 1951; Description of Activities.

The following statement is quoted from pp. 572-573 of the President's Budget for the year ending June 30, 1951. This statement of defendant's activities in detail, is printed to show that defendant serves the Army, the Navy, the Air Force, other Government agencies on the Isthmus, the Republic of Panama and the public generally, as well as the Canal.

PANAMA RAILROAD COMPANY

[Submitted under the Government Corporation Control Act]

Analysis of Budget Programs

The operations of the Panama Railroad Company comprise seven distinct activities: (1) Railroad, (2) harbor terminal facilities, (3) telephone system, (4) Hotels Tivoli and Washington, (5) commissary division, (6) coaling plant, and (7) New York office and steamship line. Statements of income and expenses for each of these activities are presented as schedule B-1. . . .

Railroad.—The railroad comprises 50 miles of main line track between the cities of Panama and Colon, at the Pacific and Atlantic terminals of the Canal, and appurtenances such as freight and passenger stations and terminals, railroad yards, industrial trackage, and the rolling stock. The railroad serves The Panama Canal, the United States Army, Navy, and Air Force, and other Government agencies on the Isthmus, and also performs the functions of a common carrier in meeting the needs of the Republic of Panama, and commercial agencies transacting business in this area. . . .

Harbor terminal facilities.—The harbor terminal facilities consist of docks, piers, and appurtenances necessary

Appendix E

(Defendant's Budget Program for 1951; Description of Activities)

for handling, transferring, stevedoring, and storing cargo arriving at the Canal Zone ports of Cristobal and Balboa, either for ultimate destination in the Canal Zone or the Republic of Panama, or for transshipment to points beyond. . . .

Telephone system.—The telephone system provides telephone service for The Panama Canal and for the civilian communities in the Canal Zone. It also leases trunk lines, circuits, and duct space to the Departments of the Army and Navy and to the Government of Panama. . . .

Hotels Tivoli and Washington.—The Hotel Tivoli in Ancon is owned by The Panama Canal but operated by the Panama Railroad Company. The Hotel Washington in Colon is owned and operated by the Panama Railroad Company.

Both hotels are operated even when financial circumstances are unfavorable because of their status as essential adjuncts to The Panama Canal, or, more broadly speaking, to the United States Government in this area. . . .

Commissary division.—The commissary division provides food supplies, clothing, and other essential requirements to Government employees and their families, to establishments of the United States Government located on the Isthmus, and to commercial shipping. In addition to retail stores in Canal Zone communities, the division operates large dry- and cold-storage plants, a bakery, an ice-cream and milk-bottling plant, an industrial laboratory, an ice plant, an abattoir, and a coffee-roasting plant, primarily as processing plants to supply its retail stores. It also operates the Mindi dairy on the Atlantic side and the Ancon laundry on the Pacific side. . . .

Appendix E

(Defendant's Budget Program for 1951; Description of Activities)

Coaling plant.—The Panama Railroad Company operates a coaling plant at Cristobal to supply coal to shipping calling at that Atlantic port. In addition to selling coal, the plant derives revenue from vessels docking at the plant pier but not taking coal. . . .

New York office and steamship line.—The New York office of the Panama Railroad Company is the main office of the Company in the United States. It has direct supervision over and responsibility for the operation of the steamship service and facilities in connection therewith; for the transportation of supplies, material, equipment, and personnel to the Canal Zone; the operation of a commissary purchasing department, and the necessary accounting required in connection with those activities. . . .

Appendix E

Defendant's Budget Program for 1951; Statements of Income and Expense.

This statement is printed in order to show that at the time the Act of 1950 was under consideration by Congress defendant budgeted its income and expense on an activity basis, with administrative expense, the only general expense payable at that time, distributed to each activity. The statement is taken from pp. 158-163 of the President's Budget for 1951.

SCHEDULE B-1.—Panama Railroad Company: Comparative Statement of Income and Expenses by Activities

[Fiscal years ending June 30, 1949, 1950, and 1951]

	1949 actual		1950 estimate		1951 estimate	
RAILROAD						
INCOME:						
Sales of services:						
Freight transportation	$1,465,293		$1,450,000		$1,450,000	
Passenger transportation	404,331		400,000		400,000	
Other transportation	100,779		95,000		95,000	
Other services	96,968		86,100		86,100	
Total sales of services		$2,067,371		$2,031,100		$2,031,100
Rents		38,912		38,900		38,900
Total income		2,106,283		2,070,000		2,070,000
EXPENSES:						
Direct operating costs:						
Maintenance of way	333,633		250,000		250,000	
Maintenance of equipment	552,290		483,000		440,400	
Transportation expenses	1,113,813		1,000,000		1,000,000	
Other expenses	42,066		37,800		36,000	
Total direct operating costs	2,041,802		1,770,800		1,726,400	
Pay increases	—	2,041,802	3,300	1,774,100	4,900	1,731,300
Administrative expenses	99,089		9,104,000		102,100	
Pay increases	—		2,300		3,400	
		99,089		106,300		105,500
Total expenses before depreciation		2,140,891		1,880,400		1,836,800
Depreciation		184,731		180,100		232,200
Total expenses		2,325,622		2,060,500		2,069,000
NET INCOME (OR LOSS (—))		—219,339		9,500		1,000

Appendix E

(Defendant's Budget Program for 1951; Statements of Income and Expense)

	1949 actual		1950 estimate		1951 estimate	
COMMISSARY						
INCOME:						
Sales of commodities	32,896,083		29,965,000		29,965,000	
Sales of services	35,682		35,000		35,000	
Total income		32,841,765		30,000,000		30,000,000
EXPENSES:						
Cost of commodities sold		27,743,925		24,201,500		24,250,300
Direct operating costs:						
Pay roll	3,064,203		3,285,200		3,322,400	
Merchandise loss and damage	256,835		265,000		265,000	
Local transportation of merchandise	307,985		305,000		305,000	
Other expenses	739,001		816,900		699,300	
Total direct operating costs	4,368,024		4,672,100		4,591,700	
Pay increases	—		29,800		44,700	
		4,368,024		4,701,900		4,636,400
Administrative expenses	312,213		344,300		337,400	
Pay increases	—		7,900		11,900	
		312,213		352,200		349,300
Total expenses before depreciation		32,424,162		29,255,600		29,236,000
Depreciation		141,271		144,400		164,000
Total expenses		32,565,433		29,400,000		29,400,000
Net income before adjustment of operating reserves		276,332		600,000		600,000
INCREASE (—) OR DECREASE IN OPERATING RESERVES:						
Reserve for employees' accrued leave		—30,767		—		—
Reserve for refrigerator guaranties		—5,577		—		—
Net adjustment of operating reserves		—36,344		—		—
NET INCOME		239,988		600,000		600,000

Appendix E

(Defendant's Budget Program for 1951; Statements of Income and Expense)

	1949 actual		1950 estimate		1951 estimate	
NEW YORK OFFICE AND STEAMSHIP LINE						
INCOME:						
Sales of services:						
Freight transportation	4,282,746		4,163,000		4,163,000	
Passenger transportation	974,396		1,050,000		1,050,000	
Baggage, mail and treasure	154,742		158,200		158,200	
Other services	36,128		39,300		39,300	
Total income		5,448,012		5,410,500		5,410,500
EXPENSES:						
Direct operating costs:						
Maintenance of ships	207,549		260,000		275,000	
Operation of ships	3,650,883		3,602,300		3,602,300	
Agency expenses	723,925		754,300		762,700	
Total direct operating costs	4,582,357		4,616,600		4,640,000	
Pay increases	—		5,400		8,000	
		4,582,357		4,622,000		4,648,000
Administrative expenses	158,859		165,500		170,900	
Pay increases	—		2,700		3,900	
		158,859		168,200		174,800
Total expenses before depreciation		4,741,216		4,790,200		4,822,800
Depreciation		482,766		476,900		476,900
Total expenses		5,223,982		5,267,100		5,299,700
NET INCOME		224,030		143,400		110,800

[Defendant's budget program for 1951 also budgeted the following activities: Harbor terminals, Hotels Tivoli and Washington, Telephone system and Coaling Plant. In each instance an allocated share of administrative expenses was shown as an item of expense.]

Appendix F

Defendant's Budget Program for 1952.

This statement, taken from defendant's first budget program after it acquired the Canal, is printed to show that defendant at that time, when the thinking of the legislative period was fresh in everyone's mind, assumed that administrative and general expenses would be distributed to each activity. The statement is taken from pp. 572-573 of the President's Budget for 1952.

PANAMA [RAILROAD] CANAL COMPANY

[Submitted under the Government Corporation Control Act]

PURPOSE AND FINANCIAL ORGANIZATION

The Panama Canal Company is a continuation of the Panama Railroad Company, a wholly owned Government corporation. . . .

The law authorizes the President to make the merger by transferring to the Corporation the Panama Canal and facilities and appurtenances related thereto. The President has announced his intention to make the transfer effective at the close of business June 30, 1951, and the Secretary of the Army and the Board of Directors of the Corporation are drafting plans to make the reorganization effective by that date. . . .

The value of the assets to be transferred to the Corporation at the time of the merger will be at such amounts as may be agreed upon between the Corporati n and the Panama Canal, subject to approval of the Di ector of the Bureau of the Budget. For the purpose of these estimates (in advance of the actual determination of the value of the assets), it is assumed for the purpose of the 1952 budget that the value of assets to be transferred from the present Panama Canal organization to the Corporation is approximately $498.5 million. Of this sum $12.9 million is esti-

Appendix F

(Defendant's Budget Program for 1952)

mated to be in the form of working capital and $485.6 million in the form of fixed assets. The portion of the latter which represents interest during construction, $129 million, is estimated to be an investment in the Corporation which will not be required to bear interest to the Treasury; the remainder of the investment transferred to the Corporation is to be interest bearing. . . .

ANALYSIS OF BUDGET PROGRAMS

Activity categories.—The operations of the Panama Canal Company will consist of a variety of activities which for budget purposes are tentatively grouped in three main categories: (1) Canal activities, (2) commercial activities, and (3) quarters.

The Canal activities will consist of those functions directly related to the waterway and handling of ships, such as the marine operation, maintenance of the Canal channel, locks, and other similar activities. The commercial activities will include all of the functions of the original Panama Railroad Company, plus many other service activities transferred from the Panama Canal, as indicated in schedule B 1. Quarters is an activity transferred from the Panama Canal, relating to the furnishing of housing.

An appropriate share of the administrative and general expenses, which in total are a joint cost of the Company and of the Canal Zone Government, is included in the expenses shown for most activities of the Company and in the expenses of the Canal Zone Government. . .

Rates used in income estimates.—The rates employed in estimating income during the fiscal year 1952 are not to be regarded as establishing the specific rate structures which will be adopted after the reorganization has been effected, but merely for a presentation of the budget program.

Appendix F

(Defendant's Budget Program for 1952)

When the plan of reorganization has been fully developed and approved by the President pursuant to law and the properties properly allocated to function and activity and their fair value fixed, the basis for determining equitable rates will be provided. Such revisions in rates as may then prove necessary will be adopted and announced. For example, the estimates for 1952 do not show the increase in income which will probably have to be obtained through higher rates or charges for services rendered, particularly for some of the commercial activities and quarters.

It is expected that the rates charged for the various activities will be carefully considered by the Board of Directors of the new Company and that appropriate changes will be made in the rates within the next year.

Canal activities.—The estimates are based on the assumption that the general level of business activities during fiscal year 1952 will be approximately at the July 1950 level. On this basis and at present rates, the gross income from operations of the Canal, including credits for the tolls of military ships, would be $26,131,000. Expenses are estimated to total $28,063,000 after deducting intra-agency transactions and after including $7,467,000 for interest on the Government's investment based on the preliminary evaluation of assets. With no change in rates, this would result in a deficit of $1,932,000. As indicated above, however, the actual determination of the properties and assets to be transferred to the Corporation which may affect the interest charge, will be made later. Also, the estimates of income projected for fiscal year 1952 are based upon the present volume of business and any increase would necessarily alter the situation concerning the deficit. The amounts shown should not be construed or be interpreted as intended to make any commitment as to any specific

Appendix F

(Defendant's Budget Program for 1952)

base for computation of canal tolls or as any determination of the exact rate which may finally be adopted. For the purpose of submission of this budget, however, a rate increase is projected, to be effective for the latter half of the fiscal year (allowing time for the Corporation to give due notice), which is estimated to produce $1,380,000 of additional income, thus bringing the deficit down to $552,000.

Commercial activities.—The gross income from commercial activities during the fiscal year 1952, exclusive of income from costs of commodities sold and intra-agency transactions, is estimated to be $19,936,000. Expenses, exclusive of costs of commodities sold and intra-agency transactions, are estimated at $22,335,000, including $2,384,000 as a proportion of Canal Zone Government expenses and $620,000 for interest payable to the United States Treasury. This indicates a net deficit from operations of $2,399,000. It may be entirely attributed to classifying interest and the proportionate cost of Canal Zone Government as expenses of commercial activities; before assignment of these two factors the operations would produce a net income of $605,000 to be applied toward payment of interest to the Treasury.

Appendix F

(Defendant's Budget Program for 1952)

Defendant's Budget for 1952; Statement of Income and Expense.

The statement is printed to show that in defendant's first budget after it acquired the Canal, all general expense, administrative expense, interest and cost of Canal Zone Government have been allocated to each activity. The statement is taken from pp. 574 and 575 of the President's Budget for 1952.

STATEMENT B.—Panama Canal Company: (Continuing the Panama Railroad Company)
Statement of Income and Expenses, and Analysis of Earned Surplus
[For fiscal years ending June 30, 1950, 1951, and 1952]

CANAL ACTIVITIES

	1950 actual	1951 estimate	1952 estimate	
INCOME:				
Sales of services:				
Tolls, at current rates	—	—	$22,400,000	
Anticipated income from increase in toll rates	—	—	1,280,000	
Other marine revenue and Canal services	—	—	1,731,000	
Total income before toll credits	—	—	25,411,000	
Credit for tolls on U. S. Government vessels:				
At current rates	—	—	2,000,000	
Income from increase in toll rates	—	—	100,000	
Total income and toll credits	—	—		$27,511,000
EXPENSES:				
Direct operating expenses	—	—	$14,963,000	
Administrative expenses	—	—	112,000	
General expenses	—	—	727,000	
Interest payable to U. S. Treasury	—	—	7,467,000	
Proportion of cost of Canal Zone Government	—	—	4,158,000	
Total expenses before depreciation and allotted share of loss on quarters	—	—	27,427,000	

Appendix F.

(Defendant's Budget Program for 1952)

	1950 actual		1951 estimate		1952 estimate	
Depreciation	—		—		1,418,000	
Allotted share of loss on quarters	—		—		118,000	
Total expenses		—		—		$28,963,000
Net income before adjustment of operating reserves		—		—		—1,452,000
Decrease in operating reserves		—		—		900,000
NET INCOME (OR LOSS (—)), CANAL ACTIVITIES		—		—		—552,000
COMMERCIAL ACTIVITIES						
INCOME:						
Sales of commodities	$25,231,843		$23,425,000		$22,791,000	
Sales of services	10,356,240		11,086,500		15,436,000	
Rents	42,326		42,900		14,000	
Other	154,870		520		1,000	
Total income		$35,785,279		$34,554,920		38,242,000
EXPENSES:						
Cost of commodities sold	20,309,743		19,020,800		18,306,000	
Direct operating expenses	13,111,863		12,990,900		15,847,000	
Administrative expenses	797,382		812,300		127,000	
General expenses	—		—		1,033,000	
Interest payable to U. S. Treasury	—		—		620,000	
Proportion of cost of Canal Zone Government	—		—		2,384,000	
Total expenses before depreciation and allotted share of loss on quarters	34,218,988		32,824,000		38,317,000	
Depreciation	1,053,732		1,230,000		2,064,000	
Allotted share of loss on quarters	—		—		200,000	
Total expenses		35,272,720		34,054,000		40,641,000
NET INCOME (OR LOSS (—)), BEFORE ADJUSTMENT OF OPERATING RESERVES		512,559		500,920		—2,300,000
Decrease in operating reserves		45,220		—		—
NET INCOME (OR LOSS (—)), COMMERCIAL ACTIVITIES		557,779		500,920		—2,300,000

Appendix F

(Defendant's Budget Program for 1952)

	1950 actual	1951 estimate	1952 estimate
QUARTERS			
INCOME: Rents	—	—	2,216,000
EXPENSES:			
Direct operating expenses	—	—	1,575,000
Administrative expenses	—	—	10,000
General expenses	—	—	41,000
Interest payable to U. S. Treasury	—	—	249,000
Proportion of cost of Canal Zone Government	—	—	312,000
Total expenses before depreciation	—	—	2,187,000
Depreciation	—	—	501,000
Total expenses	—	—	2,008,000

APPENDIX G

Schedule B-1 of Defendant's Budget for 1958.†

This statement is printed to show that, unlike those for the years 1952, 1953 and 1954, defendant's budget programs no longer allocate general expenses to its particular activities, in violation of the Government Corporation Control Act, 31 U. S. C. §847. The statement is taken from pp. 618-619 of the President's Budget for 1958. It appears on p. 34a that even direct expenses of housing, railroad, and power system now exceed the gross income of those activities.

SCHEDULE B-1.—Income and Expense, Canal and Allied Maritime Operations.

	1956 actual			1957 estimate			1958 estimate		
	Revenue	Net operating expense	Operating margin	Revenue	Net operating expense	Operating margin	Revenue	Net operating expense	Operating margin
Canal operations	$40,856,993	$16,138,275	$24,718,718	$41,353,000	$18,354,400	$22,998,600	$42,153,000	$18,374,500	$23,778,500
Other maritime operations:									
Vessel repair	1,912,871	1,673,470	239,401	1,642,500	1,428,100	214,400	1,654,400	1,440,000	214,400
Harbor terminals	4,720,757	3,391,481	1,329,276	4,520,000	3,545,000	975,000	4,540,000	3,623,100	916,900
Hotel Washington	137,248	122,885	14,363	118,900	115,100	3,800	56,900	56,700	200
Total, other maritime operations	6,770,876	5,187,836	1,583,040	6,281,400	5,088,200	1,193,200	6,251,300	5,119,800	1,131,500
Total, canal and other maritime operations[1]	47,627,869	21,326,111	26,301,758	47,634,400	23,442,600	24,191,800	48,404,300	23,494,300	24,910,000

[1] Excludes interdivisional sales and services: 1956, $2,962,091; 1957, $2,609,000; 1958, $2,799,700.

† The 1958 budget program was the last available when this Appendix was set up in type. The 1959 program (President's Budget, 551-555) is somewhat rearranged but again fails to allocate general expense to activities.

SCHEDULE B-2.—Income and Expense, Supporting Operations.

	1956 actual			1957 estimate			1958 estimate		
	Gross income	Gross operating expense	Operating margin	Gross income	Gross operating expense	Operating margin	Gross income	Gross operating expense	Operating margin
Employee services:									
United States rate housing	$ 2,080,040	$ 1,502,861	$ 577,179	$ 2,079,600	$ 1,558,900	$ 520,700	$ 2,042,400	$ 1,549,900	$ 492,500
Local rate housing	483,017	585,492	—102,475	568,200	600,800	—32,600	623,000	540,400	82,600
Service centers	3,495,899	3,407,088	88,811	2,743,500	2,719,500	24,000	2,214,200	2,209,200	5,000
Commissaries	25,904,013	25,124,907	779,106	20,400,000	20,019,500	380,500	13,760,000	13,560,000	200,000
Subtotal	31,962,969	30,620,348	1,342,621	25,791,300	24,898,700	892,600	18,639,600	17,859,500	780,100
Interdivisional sales and services	—2,519,503	—2,519,503	—	—2,043,700	—2,043,700	—	—1,661,200	—1,661,200	—
Undistributed costs, local rate housing, transferred to general corporate expenses	—	—102,475	102,475	—	—32,600	32,600	—	—	—
Total, employee services	29,443,466	27,998,370	1,445,096	23,747,600	22,822,400	925,200	16,978,400	16,198,300	780,100
Transportation and utilities services:									
Railroad	1,132,412	1,419,270	—286,858	887,000	1,371,000	—484,000	808,000	1,339,600	—531,600
Motor transportation	1,519,681	1,498,252	21,429	1,554,000	1,538,000	16,000	1,581,000	1,552,700	28,300
Steamship line	7,347,601	7,130,104	217,497	7,194,600	7,140,400	54,200	7,147,900	7,141,500	6,400
Power system	2,018,801	2,026,355	—7,554	2,386,200	2,274,300	111,900	2,616,300	2,537,900	78,400
Communications system	540,021	459,612	80,409	558,800	520,200	38,600	581,200	542,300	38,900
Water system	1,399,410	1,140,433	258,977	1,354,700	1,199,000	155,700	1,354,700	1,170,300	184,400
Subtotal	13,957,926	13,674,026	283,900	13,935,300	14,042,900	—107,600	14,089,100	14,284,300	—195,200
Interdivisional sales and services	—4,716,338	—4,716,338	—	—4,906,200	—4,906,200	—	—4,855,400	—4,855,400	—
Undistributed costs transferred to general corporate expenses:									
Railroad	—	—286,858	286,858	—	—484,000	484,000	—	—	—
Power system	—	—7,554	7,554	—	—	—	—	—	—
Total, transportation and utilities services	9,241,588	8,663,276	578,312	9,029,100	8,652,700	376,400	9,233,700	9,428,900	—195,200
Other supporting services:									
Tivoli guesthouse	322,239	318,281	3,958	295,800	295,000	800	284,300	283,800	500
Printing plant	337,110	331,837	5,273	328,100	351,600	—23,500	314,800	313,800	1,000
Grounds maintenance	948,450	924,557	23,893	983,900	961,600	22,300	977,500	954,500	23,000
Engineering and maintenance services	4,179,789	4,251,449	—71,660	4,444,300	4,359,600	84,700	4,654,300	4,552,700	101,600
Supply operations	3,093,301	2,680,627	412,674	2,638,200	2,391,600	246,600	2,440,500	2,264,700	175,800
Subtotal	8,880,889	8,506,751	374,138	8,690,300	8,359,400	330,900	8,671,400	8,369,500	301,900
Interdivisional sales and services	—5,936,758	—5,936,758	—	—6,004,200	—6,004,200	—	—6,120,100	—6,120,100	—
Undistributed costs and credits transferred to general corporate expenses:									
Printing plant	—	—	—	—	—23,500	23,500	—	—	—
Engineering and maintenance services	—	—71,660	71,660	—	—	—	—	—	—
Scrap operations	—	79,219	—79,219	—	73,000	—73,000	—	—	—
Total, other supporting services	2,944,131	2,577,552	366,579	2,686,100	2,404,700	281,400	2,551,300	2,249,400	301,900
Grand total, supporting operations	41,629,185	39,239,198	2,389,987	35,462,800	33,879,800	1,583,000	28,763,400	27,876,600	886,800

APPENDIX H.

1958 Budget Programs of Tennessee Valley Authority and Virgin Islands Corporation.

This statement is printed to show that other multi-activity Government corporations, such as the Tennessee Valley Authority and the Virgin Islands Corporation, continue to comply with the Government Corporation Control Act, 31 U. S. C. §847, by allocation of general expenses to particular activities. The statement relating to the Tennessee Valley Authority is taken from pp. 216-217 of the President's Budget for 1958; that relating to the Virgin Islands Corporation (p. 38a) from pp. 790-791.

1958 BUDGET PROGRAM OF TENNESSEE VALLEY AUTHORITY.†

Program Expense	1956 actual	1957 estimate	1958 estimate
Navigation, flood control, and power program:			
Navigation operations	230,011	248,000	254,000
Flood control operations	200,283	211,000	227,000
Multipurpose reservoir operations	1,953,085	2,263,000	2,327,000
Topographic mapping	—	—	315,000
Distribution of administrative and general expenses	178,603	197,000	221,000
Total navigation, flood control, and power program	2,561,982	2,919,000	3,344,000
Fertilizer, agricultural, and munitions program:			
Fertilizer and munitions development	2,233,921	2,584,000	—
Fertilizer, agricultural, and munitions development	—	—	2,904,000
Distribution of administrative and general expenses	87,842	96,000	112,000
Total fertilizer, agricultural, and munitions program	2,321,763	2,680,000	3,016,000

† The 1958 budget program was the last available when this Appendix was set up in type. The 1959 program (President's Budget, 185-191) indicates, although not so specifically, the allocation of general expenses.

Appendix H.

(1958 Budget Program of Tennessee Valley Authority)

	1956 actual	estimate 1957	1958 estimate
Watershed protection and improvement program:			
Watershed protection and improvement	—	—	1,061,000
Distribution of administrative and general expenses	—	—	68,000
Total watershed protection and improvement program	—	—	1,129,000
Resource development program:			
Resource development	382,211	1,150,000	—
Distribution of administrative and general expenses	31,484	90,000	—
Total resource development program	413,695	1,240,000	—
General service activities: Maintenance of bridges financed by others on TVA dams	3,735	8,000	8,000
Total program expense	5,301,175	6,847,000	7,497,000

• • • • • •

Appendix H.

(1958 Budget Program of Tennessee Valley Authority)

Program Expense	1956 actual	1957 estimate	1958 estimate
Navigation, flood control, and power program:			
Power operations	125,270,539	134,867,000	149,680,000
Multipurpose reservoir operations	1,626,854	1,814,000	1,857,000
Distribution of administrative and general expenses	1,444,845	1,585,000	1,612,000
Total navigation, flood control, and power program	128,342,238	138,266,000	153,149,000
Fertilizer, agricultural, and munitions program:			
Fertilizer and munitions development	14,741,056	15,772,000	—
Fertilizer, agricultural, and munitions development	—	—	15,317,000
Distribution of administrative and general expenses	303,726	324,000	325,000
Total fertilizer, agricultural, and munitions program	15,044,782	16,096,000	15,642,000
Resource development program:			
Resource development	573,318	—	—
Distribution of administrative and general expenses	47,227	—	—
Total resource development program	620,545	—	—
General service activities:			
Reimbursable services	3,304,329	2,193,000	1,745,000
Distribution of administrative and general expenses	26,393	27,000	26,000
Total general service activities	3,330,722	2,220,000	1,771,000
Total program expense	147,338,287	156,582,000	170,562,000

Appendix H.

1958 Budget Program of Virgin Islands Corporation.†

As explained on p. 35a, this statement is printed to show that other multi-activity Government corporations continue to allocate general expenses to activities in compliance with the Government Corporation Control Act, 31 U. S. C. §847.

VIRGIN ISLANDS CORPORATION

B. Statement of Income and Expense

	1956 actual	1957 estimate	1958 estimate
LOAN PROGRAM			
Income: Interest on loans	$ 1,200	$ 10,300	$ 16,300
Expense:			
Interest on borrowings from Treasury	510	4,900	7,700
Loan servicing expense	—	100	100
Allocation of administrative expense	100	900	1,300
Total expense	610	5,900	9,100
Net operating income (or loss (—)), loan program	590	4,400	7,200
SUGAR PROGRAM			
Income: Sales of sugar and molasses	1,654,006	1,578,600	1,485,700
Expense:			
Growing and harvesting:			
Cost of growing and harvesting	377,833	482,697	471,800
Increase or decrease (—) in sugarcane inventory	71,967	—7,497	—16,800
Allocation of administrative expense	28,457	26,500	26,400
Other expense	23,659	19,300	19,300
Interest on borrowings from Treasury	19,892	23,200	23,900
Depreciation	36,572	39,400	40,600
Total, growing and harvesting expense	558,380	583,600	565,200

† Cf. footnote, p. 35a. The 1959 program (President's Budget, 697) also allocates administrative expense to activities.

Appendix H.

(1958 Budget Program of Virgin Islands Corporation)

	1956 actual	1957 estimate	1958 estimate
Manufacturing, shipping, and selling:			
Sugarcane purchased	329,818	337,000	337,000
Manufacturing expense	518,473	488,300	443,300
Shipping and selling expense	191,722	211,100	199,000
Allocation of administrative expense	80,590	84,300	81,900
Other expense	82,212	61,500	59,800
Interest on borrowings from Treasury	69,122	74,100	74,200
Depreciation	127,084	125,600	126,000
Writeoff of accounts receivable	155	—	—
Increase or decrease (—) in allowance for losses on accounts receivable	—156	—	—
Total, manufacturing, shipping, and selling expense	1,399,020	1,381,900	1,321,200
Total expense, sugar program	1,957,400	1,965,500	1,886,400
Net operating loss (—)	—303,394	—386,900	—400,700
• • •	• • •		
POWER PROGRAM			
Income: Sales of power	611,765	690,000	725,700
Expense:			
Production	250,394	280,000	290,000
Distribution	48,760	44,000	37,000
Allocation of administrative expense	25,590	25,800	27,800
Other expense	89,123	93,000	95,000
Interest on borrowings from Treasury	35,573	46,600	56,900
Depreciation	77,218	95,000	105,000
Writeoff of accounts receivable	7,972	—	—
Decrease (—) in allowance for losses on accounts receivable	—7,672	—	—
Total expense	526,958	584,400	611,700
Net operating income	84,807	105,600	114,000

[The program for miscellaneous activities also included an item "allocation of administrative expense".]

APPENDIX I

Early Legislative History of the Act of September 26, 1950.

a. House Resolution 44, 81st Cong. 1st Sess., adopted February 28, 1949 (95 Cong. Rec. 1617)

Whereas it is the responsibility of the Congress of the United States to establish the policy to be followed in prescribing the tolls that shall be levied for the use of the Panama Canal; and

Whereas there have been substantial changes in economic conditions since Congress last established such policy, including the effect of such tolls upon American shipping: Therefore be it

---

Resolved, That the Committee on Merchant Marine and Fisheries or any duly authorized subcommittee thereof is authorized to make a full and complete study and analysis of the financial operation of the Panama Canal with particular reference to the proper accounting and allocation of costs attributable to—

(a) the transit of the Canal by commercial, governmental, and military vessels of United States and foreign nations;

(b) military activities of the United States in and connected with the Canal Zone;

(c) United States civil government, including, but not limited to, sanitation, public schools, playgrounds, hospitals, and so forth;

(d) business operations conducted under the supervision of the Governor General of the Panama

Appendix I

(Early Legislative History of the Act of September 26, 1950)

Canal by the various business units of the Panama Canal and Panama Railroad Company;

and to recommend to the Congress concerning what elements of cost should be properly used in the future as the basis of a policy to be followed in establishing and levying tolls for the use of the Panama Canal for transit purposes.

Resolved, That the President of the United States be, and hereby is, requested to defer until after submission of the committee's report any change in tolls currently levied for the use of the Panama Canal.

b. Report of the House Committee on Merchant Marine and Fisheries, made August 23, 1949 (Report No. 1304, 81st Cong. 1st Sess.)

The Committee on Merchant Marine and Fisheries has adopted and ordered reported the following report on the investigation of Panama Canal tolls.

Pursuant to the authority conferred by House Resolution 44, Eighty-first Congress, a Special Subcommittee to Investigate Panama Canal tolls, conducted an investigation and made the following interim report:

Introduction

In the course of its deliberations, the special subcommittee appointed to consider the question of tolls on the Panama Canal has held numerous hearings and has visited the Canal Zone. Full consideration was given to the testimony of the shipping industry, the Association of American Railroads, the Governor of the Panama Canal and

Appendix I

(Early Legislative History: 1949 Report of House Committee)

members of his organization, and others whose experience qualified them to give expert testimony on the subject. Available records of the business operation of the Canal were carefully studied. Copies of the hearings are either available or will be made so in due course...

While the present question of increasing the tolls from 90 cents to $1 may not have assumed the proportions of a crisis in the public mind, it does approach that stage in the minds of the shipping people, and particularly the intercoastal operators. In any event, the effect of the increase is so far reaching in both national and international affairs as to merit the most careful study, and the most expert consideration.

Having reached this conclusion, the committee looked into the history of the present Presidential Proclamation No. 2775 of March 26, 1948. Apparently it started at a hearing before the Appropriations Committee which concerned the affairs of the Panama Canal in general. The Governor of the Panama Canal made a statement to the effect that costs were increasing and that the margin between costs and receipts from tolls was consequently shrinking. A committee member then remarked that in such a case, perhaps the tolls should be increased. There is no question that the available figures would seem to have indicated the reasonableness of this observation on the part of the committee member.

The fixing of rates and charges by transportation facilities is generally the subject of exhaustive and expert studies. However, in the present case the records indicate that the next step was a recommendation, drawn quite properly by the Washington office of the Panama Canal approved first by the Governor and then by the Secretary of the Army, and then placed on the President's desk.

Appendix 1

(Early Legislative History: 1949 Report of House Committee)

In the absence of any recommendations to the contrary, the President signed the proclamation and published it. This was followed by a vigorous protest on the part of the shipping interests, whereupon the effective date of the proclamation was changed from October 1, 1948, to April 1, 1949, in order to permit the introduction of House Resolution 44, and the consequent deliberations of this committee.

This resolution, among other things, requested the President to defer until after the submission of the committee's report, any change in tolls currently levied for the use of the Panama Canal. This request was granted, and the effective date of the proclamation now stands at September 1, 1949.

The steps by which the President's proclamation No. 2775 of March 26, 1948, was issued, present some very unusual characteristics.

It is strange that the fixing of tolls should be a responsibility of the President. However, it is so designated by the basic law of 1912, and it has remained so throughout the years. Periodically, therefore, the President faces the problem. Presumably he calls in such of his executive staff as may be suitable. These would include his executive assistants, the Bureau of the Budget, and others who may be readily accessible. However, at no place in the chain of events does there appear to have been consultation with any qualified rate-making authority.

However, the toll question is intimately linked to the administration, operation, and accounts of the Canal. The appropriate toll policy can hardly be decided upon and administered without business-type accounts, similar to those of public utilities, upon which to rely for the basic financial and operating data. The status of the Canal as

a business enterprise can be further clarified by making toll receipts available to it as operating revenues, returning interest to the Government at the going rate as provided for Government corporations. These purposes can be achieved in government only through the corporate and the accompanying business-type budget and commercial-type audit. It appears to the committee that in these days of reorganization, it is a most appropriate time to consider the extension of the corporate form of organization to the operation of all functions of the Panama Canal except those having to do primarily with national defense.

This conclusion is reached after study of the accounts of the Canal as reflected in various annual reports. Through these the committee tried to segregate the different operations into an orderly system and to separate those functions which should properly be charged or credited to the national defense system from those which pertain primarily to commercial operation. It is believed to be impossible to arrive at any satisfactory conclusion until the Canal functions have been placed either within the Panama Railroad Company or in a separate corporation with an appropriate type of accounting which segregates defense measures from commercial capital costs and operating expenses on the basis of appropriate legislative allocation.

c. Statement of Frazer Bailey to subcommittee on Panama Canal Tolls of the House Merchant Marine Committee on May 23, 1949 at hearings on H. Res. 44.

Mr. BAILEY. Mr. Chairman and gentlemen of the committee; my name is Frazer Bailey. I am president of the national Federation of American Shipping, who represent two-thirds of all the privately owned deep-water dry-cargo

Appendix I

(Early Legislative History: Statement of Frazer Bailey)

vessels under the American flag, and approximately one-half of the tanker fleet.

On February 28 the House of Representatives passed House Resolution 44. I will not take the committee's time to read it. You gentlemen, I know, are thoroughly familiar with it. It calls for a report by June 30 on the policy that should be used in the future in establishing and maintaining the toll system at Panama.

The passage of House Resolution 44 grew out of the fact that in response to a suggestion contained in the report of the Appropriations Committee on the Army civil functions appropriation bill for the fiscal year ending June 30, 1949, in the House of Representatives there was a suggestion that Panama Canal tolls should be increased, and as the Chairman said a moment ago, the question of an increase arose due to an increase in what appear to be the operating costs in the Canal Zone.

The President, in response to a recommendation from the Department of the Army, issued a proclamation, No. 2775, on March 26, 1948, increasing the applicable tolls from 90 cents to $1 per Panama Canal net ton for laden vessels. When this appropriation bill, H. R. 5524, was before the Senate, representatives of the shipping industry and Members of the Congress appeared before the Senate Appropriations Committee and pointed out that no testimony was made available to the Appropriations Committee of the House. They further testified as to the effect of such a tolls increase upon American shipping, the lack of justification therefor, and other matters relating to this subject.

The report of the Senate committee, No. 1167, of April 23, 1948, contained the following statement on the subject:

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(Early Legislative History: Statement of Frazer Bailey)

Shortly after the committee hearings, and prior to its publication, the committee was advised that the Department of the Army submitted to the Chief Executive a proclamation, which was signed by the Chief Executive, increasing Panama Canal tolls for laden vessels from 90 cents to $1 per ton, to become effective October 1, 1948.

In view of the additional information and evidence on this matter developed at the committee's hearings, which was not available to the House committee, the committee strongly urges that the proclamation increasing the Panama Canal tolls be reviewed, especially in the light of the adverse effect such an increase will have on American shipping.

On September 8, 1948, the President issued a proclamation in which he deferred the effective date of the toll increase previously authorized until April 1, 1949, and on March 14, 1949, the President again postponed the effective date of such a proposed increase in Panama Canal tolls by a similar proclamation until September 1, 1949.

In the President's proclamation on this subject he stated:

Whereas, by House Resolution 44 of the Eighty-first Congress adopted February 28, 1949, the Committee on Merchant Marine and Fisheries

(1) is authorized to make a full and complete study and analysis of the financial operation of the Panama Canal, and to recommend to the Congress concerning what elements of cost should be properly used in the future as the basis of a policy to be followed in establishing and levying tolls for the use of the Panama Canal for transit purposes; and

Appendix I

(Early Legislative History: Statement of Frazer Bailey)

(2) is directed to report its findings, together with its recommendations for such legislation as it may deem advisable to the House at the earliest practicable date, but not later than June 30, 1949; and

Whereas the President is requested by said resolution to defer until after submission of the committee's report any change in tolls currently levied for the use of the Panama Canal; and

Whereas it appears consistent with the public interest to postpone the effective date of the said Proclamation No. 2775 until September 1, 1949, so as to permit continuance of the present tolls until the Congress shall have had adequate opportunity for consideration of the committee's report.

The Federation greatly appreciates the opportunity of appearing before your committee to suggest what in its opinion would constitute a fair and equitable basis or policy to be followed in the future in establishing and levying tolls for the use of the Panama Canal for transit purposes.

My presentation is confined to the operation of the Canal as it presently exists.

The shipping interests which we represent believe that the Panama Canal should be placed upon a pay-as-you-go basis, after full consideration of its military and its commercial characteristics.

We do not believe that the American taxpayer should be called upon to provide funds for the operation of the Panama Canal for transit purposes. We believe the Canal should be self-sustaining from its toll receipts as to all expenses incurred in its operation for transit purposes.

Appendix I

(Early Legislative History: Statement of Frazer Bailey)

For the reasons we will show, we believe there should be a recognition of the military value of the Canal in such a toll policy, and thereafter it should operate without profit and without loss.

We respectfully suggest to your committee for its consideration the following fundamental principles as a basis for a future toll policy of the Panama Canal:

(*a*) Recognizing that the Canal is a dual-purpose establishment for national defense and for commercial transits, and that no part of the cost of its construction or of its operation has heretofore been charged to national defense, we suggest that in the future the minimum contribution which may be equitably made on account of its national defense characteristics is that there should be no further charge for interest on capital provided for its construction or improvement by the United States Government.

(*b*) The future toll schedule at Panama should reflect rates sufficient to pay all operating expenses properly allocable to transit operation, including maintenance, depreciation of all expendable parts, and a proper charge for the expense of providing all facilities and services necessary to the operation of the Canal and for its employees and for their families.

(*c*) There should be no preference or exemption to toll computation for ships, but all ships of all types, commercial and military, of all nationalities, should be treated equally.

(*d*) In determining the allocation of expenses for multiple-purpose services, functions or facilities, such allocation to be upon the basis of one arbitrary one-half there-

Appendix I

(Early Legislative History: Statement of Frazer Bailey)

for for some other logical division, such multiple services and facilities to include school, police, fire, physical education, libraries, license bureaus, civil affairs, hospitals, clinics, sanitation, highways, sewers, public buildings and grounds, office of paymaster and collector, accounting offices, offices in the United States, personnel administration, office of general counsel, and general correspondence and records, such arbitrary allocation being assumed to represent that portion of the services necessarily a part of the Canal operation and of its employees and their dependents as compared with the military and civil personnel who similarly use these services and these facilities.

The expenses of air terminals, post offices, quarantine and immigration, and cemeteries not to be charged against the operation of the Canal. We think it is obvious that they are public facilities furnished by all communities.

Any business functions operated by Canal personnel which perform at a profit to be credited against the operating expenses of the Canal in order to reach a net expense item.

(*e*) The rental charge paid to the Republic of Panama for the area represented by the Canal Zone, in an amount of $430,000 per year, should be allocated on the basis of the areas utilized for military purposes, for Canal purposes, and for other purposes.

The Panama Canal Zone is an area extending 5 miles on both sides of the Canal between the Atlantic and the Pacific. The land area is 372 square miles. It is used in part, 95 square miles, for defense installations of the Army, Navy, and Air Force, and 13.6 square miles for the operation of the Canal and ancillary activities. The remaining land is either assigned to cattle pastures, commercial licensees, forest preserves, swamps, and so forth.

APPENDIX J

PANAMA CANAL COMPANY

Statement of Source and Disposition of Funds
July 1, 1951 to June 30, 1957

($000 Omitted)

Statement prepared by plaintiffs' accountants from defendant's reports for fiscal years 1952-1957.

FUNDS PROVIDED:			
Income from operations		$20,156	
Add back non fund transactions:			
Depreciation (A)	$33,000		
Provision for overhaul of locks	6,264 (B)		
Amortization of slide hazard removal	600 (C)		
Total non-fund transactions		39,864	
Funds provided by operations		60,020	
Gain on sale of "SS. *Panama*"		4,272	
Decrease in inventories		7,693	
Increase in current liabilities		4,494	
Total Funds Provided			$76,479
DISPOSITION OF FUNDS:			
Dividends paid to U. S. Treasury		$15,000	
Acquisition of fixed plant (net of salvage) (A)		38,000	
Cost of overhaul of canal locks		4,105 (B)	
Cost of slide hazard removal		4,067 (C)	
Increase in notes receivable:			
Current	$1,070		
Long Term	3,208	4,278	
Increase in accounts receivable		818	
Increase in other current assets		124	
Increase in other assets and deferred charges		682	
Decrease in reserve for rehabilitation of commissary plant		750	
Transfers, adjustments and retirements affecting property accounts and related allowances for depreciation obsolescence and revaluation (net) (estimated)		102	
Total Disposition of Funds			67,926

Depreciation (A)	$33,000		
Provision for overhaul of locks	6,264 (B)		
Amortization of slide hazard removal	600 (C)		
Total non-fund transactions		39,864	
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Increase in other assets and deferred charges		682	
Decrease in reserve for rehabilitation of commissary plant		750	
Transfers, adjustments and retirements affecting property accounts and related allowances for depreciation obsolescence and revaluation (net) (estimated)		102	
Total Disposition of Funds			67,926
Increase in Cash			$ 8,553

(A) Taken to the nearest $100,000 in accordance with pages 24-25 of 1957 report.

(B) Assumed that $1,080,800 provided for locks overhaul in fiscal year 1957, the same amount as in fiscal years 1954 and 1956.*

(C) Assumed that $200,000 of slide hazard cost amortized in fiscal year 1957, the same amount as in fiscal years 1955 and 1956.*

* Comment by counsel: The meager character of the information provided by the 1957 report is described in footnote 4, *supra* p.

Office Supreme Court, U.S.
FILED
APR 10 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 251.

PANAMA CANAL COMPANY,

Petitioner,

v.

GRACE LINE, INC., ISBRANDTSEN COMPANY, INC., LUCKENBACH STEAMSHIP COMPANY, INC., MATSON NAVIGATION COMPANY, MOORE-McCORMACK LINES, INC., ORE NAVIGATION CORPORATION, CALMAR STEAMSHIP CORPORATION, POPE AND TALBOT, INC., STATES MARINE CORPORATION OF DELAWARE, UNITED FRUIT COMPANY, UNITED STATES LINES COMPANY, WEYERHAEUSER STEAMSHIP COMPANY *et al.*,

Respondents.

No. 252.

GRACE LINE, INC., ISBRANDTSEN COMPANY, INC., LUCKENBACH STEAMSHIP COMPANY, INC., MATSON NAVIGATION COMPANY, MOORE-McCORMACK LINES, INC., ORE NAVIGATION CORPORATION, CALMAR STEAMSHIP CORPORATION, POPE AND TALBOT, INC., STATES MARINE CORPORATION OF DELAWARE, UNITED FRUIT COMPANY, UNITED STATES LINES COMPANY, WEYERHAEUSER STEAMSHIP COMPANY *et al.*,

Petitioners,

v.

PANAMA CANAL COMPANY,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

REBUTTAL BRIEF FOR GRACE LINE *et al.*

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PANAMA CANAL COMPANY,

Respondent.

REBUTTAL BRIEF FOR GRACE LINE *et al.*

POINT I.

The summary judgment ordered by the Court of Appeals requires that tolls be fixed on the basis of the Canal activity, and without regard to the losses of the business activities. That Court did not decide that the accounts stated by the General Accounting Office were, as such, binding on the defendant.

In view of the questions by the Court as to what the Court of Appeals had decided, it deserves to be noted that the Court of Appeals remanded the case "for judgment for plaintiffs *in accordance with the opinion of the Court*" (R. 258).

That opinion, at R. 248-249, forbade the inclusion of the losses of the business activities in the prescription of tolls.

The Court of Appeals nowhere held that the accounts stated by the General Accounting Office were, as such and as a matter of GAO construction of Section 412(b), binding on defendant.

If the summary judgment granted by the Court of Appeals is affirmed, and it is held that tolls must be fixed on the basis of the Canal operation, plaintiffs will *then* argue to the District Court that the accounts stated by the General Accounting Office *of the Canal operation only*, i.e., as distinguished from the business activities, are binding on the defendant, not because the Court of Appeals so held, but because, in our opinion, the Government Corporation Control Act so requires, once the question of the interpretation of Section 412(b) has been settled. Our argument on this score has not been presented to the Court of Appeals or to this Court. Prayer No. 4 of the complaint, which has received considerable attention in this Court, received no

attention from either side in the Court of Appeals, or from the Court.

POINT II.

Defendant's "ambiguous bookkeeping" has misled its counsel into making incorrect statements in its reply brief. The operating results of the business activities have been reversed and the losses loaded on tolls.

At p. 13 of its reply brief defendant takes issue with plaintiffs' assertion (Plaintiffs' Main Brief, 65-66) that there has been an "unexplained reversal in the operating results of the business activities."

Specifically, defendant asserts at p. 13 that in 1954 the "supporting service operations"—meaning the business activities—"were able to pay a very large portion of the *Administrative and General Expense* [sic] and still earn a profit comparable to that of the Panama Railroad Company."

But the very figures which defendant quotes at p. 13 show that, allocating to the business activities their share of the administrative expense as determined by GAO on the basis of defendant's own analysis (R. 53-54; cf. R. 25, 27), i.e., 75%, defendant's business activities not only failed in 1954 to earn any profit at all, but failed to earn their own administrative expense.

In fact in 1949—the last fiscal year before the Bureau of the Budget study and the Congressional hearings and reports—the business activities earned a *profit* after administrative expense of $1,173,168 (1949 report, The Panama Canal, 28; President's Budget, 1951, p. 158).

On the other hand, for 1958, defendant has budgeted for the business activities a *deficit* after administrative expense of $3,250,450 (President's Budget, 1958, pp. 615, 618, 619).*

Defendant argues (Reply Brief, 14) that the deficit in the business activities was "caused by inexorable economic laws, not by ambiguous bookkeeping and concealment." The point made by the Court of Appeals was that the "ambiguous bookkeeping" had "concealed" the profits of the Canal, R. 249.

POINT III.

There are too many contradictions in the record to warrant acceptance of defendant's protestations of good faith.

Defendant's reply brief protests its good faith respecting its construction of the statute and its failure to allocate overhead to the Canal activity in its bookkeeping.

Yet defendant's brief is silent respecting the legislative history which shows so clearly what was intended; defendant offers no theory as to "share" of the costs of the Canal Zone Government in Section 412(b), a provision which indisputably shows that the Canal was not to pay

---

* Operating margin of the "supporting operations" is shown as $886,800 and of "allied maritime operations" as $1,134,500 (pp. 618-619); administrative expense, described as "other general corporate charges," is shown as $7,015,000, of which 75% is attributable to the business activities, *supra*, p. 3. [75% is probably low because in recent years defendant has been treating the direct expense deficit of certain business activities as an administrative expense of the overall operation. Cf. Plaintiffs' Main Brief, Appendix G, 38a.]

the entire cost of the Canal Zone Government and therefore, by necessary implication, not to underwrite the losses of the business activities; defendant does not explain how its 1952 budget program so clearly understood the meaning of the statute, and above all, defendant does not supply the opinion of its own General Counsel who, according to GAO, advised the defendant that it was breaking the law—*a withholding that strikes at the very heart of defendant's claim of good faith.*

POINT IV.

The meaning of the expression "Panama Canal, together with the facilities and appurtenances related thereto" is perfectly clear.

Defendant tries in the reply brief to show that the meaning of the expression "Panama Canal, together with the facilities and appurtenances related thereto" is doubtful. Yet defendant's definitions of "Canal activities" in its 1952 report (R. 171), and in its 1952 budget program (Appendix A, 27a) and Tables 30 and 31 of its 1952 report, not printed in the Record, shows that it understood that expression very well.

Defendant seems to argue (Reply Brief, 11) that to allocate general expense to the Canal activity is not feasible as a matter of accounting. However defendant was able to make such allocations without difficulty in its 1952 budget program (Plaintiffs' Main Brief, Appendix F, 26a-32a). The Comptroller General has had no trouble in making such allocations.

Defendant suggests, if we understand its brief correctly (Reply Brief, 18-19), that plaintiffs claim that *all* the

properties transferred in 1956 are to be included in the tolls formula. We make no such claim. President Truman's transfer order, following Section 10 of the Act of 1950, distinguishes between the Canal and its facilities, and other facilities then transferred (Plaintiffs' Main Brief, 31-33).

POINT V.

To include the losses of the business activities violates the Hay-Pauncefote treaty.

Defendant's argument on this score seems to be based on the claim that the British Government once said that warships going through the Canal *for its protection* need not pay a toll. The relevance of this statement is not understood. Certainly the British Government has never conceded that national defense costs properly entered the rate base. In view of the British Government's initial position in 1899-1900, agreed to by Secretary Hay, that the United States should not even fortify the Canal (Doc. 746, 61st Cong., 3d Sess.), any such concession would seem most unlikely. The British Government, when protector of the Suez Canal, never charged for that service; neither the British nor United States Governments presently agree that military protection is properly included in the Suez Canal rate base. Moreover, Armed Forces expenditures at Panama are for "national defense", not for the defense of the Isthmus as such.

POINT VI.

The reply brief arguments respecting mandatory injunction are invalid.

Our argument respecting the mandatory injunction granted by this Court in *Brown* v. *Board of Education*, 347 U. S. 483, and related cases, is hardly answered by showing what one plaintiff asked for.

The lower court "segregation" cases frequently involve double negative injunctions, it is true, but such injunctions are in substance mandatory. Indeed such injunctions were characterized in *Liscio* v. *Campbell*, 34 F. 2d 646, 647 (C. A. 2d), as the "starkest of solecisms."

Whether or not there was special statutory authority for the mandatory injunctions in the Interstate Commerce Act cases, a point we have not had time to research, certainly such cases as *In re Lennon* turned on the ground that the federal courts had general power to grant mandatory injunctions. That point was expressly held.

Defendant cites no provision of the Railway Labor Act which authorizes the mandatory injunctions granted in *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515, *Delaware & Hudson R. Corp.* v. *Williams*, 129 F. 2d 11 (C. A. 7th), or *Steele* v. *L. & N. R. Co.*, 323 U. S. 192. We can find none, and the courts cited none.

Defendant distinguishes the prohibition cases on the ground that the "necessary implication" of the National Prohibition Act was that the courts had power to grant mandatory relief. Certainly the provision of the Adminis-

trative Procedure Act is far more specific than that of the National Prohibition Act.

April 9, 1958.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 251.

PANAMA CANAL COMPANY,

Petitioner,

v.

GRACE LINE, INC., ISBRANDTSEN COMPANY, INC., LUCKENBACH STEAMSHIP COMPANY, INC., MATSON NAVIGATION COMPANY, MOORE-McCORMACK LINES, INC., ORE NAVIGATION CORPORATION, CALMAR STEAMSHIP CORPORATION, POPE AND TALBOT, INC., STATES MARINE CORPORATION OF DELAWARE, UNITED FRUIT COMPANY, UNITED STATES LINES COMPANY, WEYERHAEUSER STEAMSHIP COMPANY *et al.*,

Respondents.

No. 252.

GRACE LINE, INC., ISBRANDTSEN COMPANY, INC., LUCKENBACH STEAMSHIP COMPANY, INC., MATSON NAVIGATION COMPANY, MOORE-McCORMACK LINES, INC., ORE NAVIGATION CORPORATION, CALMAR STEAMSHIP CORPORATION, POPE AND TALBOT, INC., STATES MARINE CORPORATION OF DELAWARE, UNITED FRUIT COMPANY, UNITED STATES LINES COMPANY, WEYERHAEUSER STEAMSHIP COMPANY *et al.*,

Petitioners,

v.

PANAMA CANAL COMPANY,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENTS' APPLICATION FOR AMENDMENT OF OPINION.

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IN THE

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Petitioners,

v.

PANAMA CANAL COMPANY,

Respondent.

RESPONDENTS' APPLICATION FOR AMENDMENT OF OPINION.

(Emphasis added.)

Respondents respectfully request the Court to make certain amendments in its opinion herein, announced April 28, 1958, so as to correct what respondents submit are

errors of fact based upon statements, or misstatements, in petitioner's brief.

That the Panama Canal tolls situation is a continuing one and that this Court's decision is by its terms applicable only to "the controversy at present" and "at this stage" foreshadows legislative and judicial hearings at which this Court's opinion will receive close attention. Respondents submit that it is therefore more than usually important that the opinion be wholly accurate factually.

I. Statements in the opinion indicating that there was a dispute between petitioner and the Comptroller-General over the extent of its allocations, i.e., over accounting practice as distinguished from statutory interpretation.

(A) At page 6 the opinion states:

> "The Comptroller General in 1955 expressed the view that the petitioner had allocated too high a share of the costs of the Canal Zone Government, of the corporate overhead, and of interest payments to the operations of the Canal and too little to its supporting or auxiliary activities."

This sentence is taken almost word-for-word from page 13 of petitioner's brief. It is, however, wholly unsupported, indeed, directly contradicted by the Record. The fact is that petitioner had made no allocations whatever. The Comptroller-General's 1954 report, made in 1955, so states (R. 52),* And again at R. 42, the Comptroller-General said:

---

*"We made allocations of interest, administrative and other general expenses, and the net costs of Canal Zone Government on the bases explained in the footnotes on page 13. A similar study was not made by the Company."

> "However, the Company did not have available for our examination an analysis to determine the financial results by activities."

In his 1955 report, made in 1956, the Comptroller-General asserted at page 18:

> "During our 1955 audit we again requested the Company to furnish an analysis of financial results by activity. Although we were informed that an analysis had been prepared, it was not made available for our use."

Not only was there no dispute in 1955 between the Company and the Comptroller-General over the extent of its allocations, but the Comptroller-General, in so far as the Company had, in former times, indicated a theory as to allocation, adopted it. Thus corporate overhead was allocated by the Comptroller-General in 1955 on the "direction-of-effort basis . . . used by the Company in 1953 for statistical purposes." R. 54, footnote (c).

Petitioner has thus made no allocations whatsoever. There was nothing with which the Comptroller-General could disagree.

However, it is clear from the statement in this Court's opinion on page 6 that this Court was misled by petitioner's brief into thinking that there was a dispute respecting the allocations of petitioner's general expenses in the calculation of the tolls formula.

(B) On page 8 of the opinion the Court refers to a "conflict" over "cost accounting" and on page 9 to "petitioner's . . . methods of accounting and cost allocation."

We have, we believe, demonstrated that there is no such conflict, and that petitioner, having made no cost allocation, can hardly be said to have a "method" of cost allocation.

These statements also reflect, we believe, the Court's misapprehension resulting from the misstatement on page 18 of petitioner's brief.

(C) Out of abundance of caution we also refer to the question which on page 8 of the opinion the Court says "involve problems of statutory construction and cost accounting; whether an operating deficit in the auxiliary or supporting activities is a legitimate cost in maintaining and operating the Canal for purpose of the toll formula."

Petitioner never published any *accounts* showing such a deficit as a cost of maintaining and operating the Canal "for purpose of the toll formula," or for any purpose. Petitioner's accounts of the cost of maintaining and operating the Canal are wholly acceptable to the Comptroller General and respondents. We annex, as Appendix A, its account of such costs for 1954 (taken from page 49 of its 1954 report), which is typical of petitioner's statements in its annual reports as to costs of maintenance and operation of the Canal.

Petitioner's theory in this respect is wholly one of statutory construction as can readily be observed from pages 15-20 of the Reply Brief, the only place in which it is squarely advanced. No accounting problems are involved.

Because this Court was misled by the misstatement on page 18 of petitioner's brief into thinking that there were differences as to the allocation of the general expenses and therefore disputes over accounting practices, whereas there are no such disputes, respondents ask that the sentence from page 6 of the opinion, and the other references to disputes over accounting and allocation be eliminated from the opinion.

II. The statement that the tolls formula contemplated that tolls should be fixed at less than cost.

On page 3 of the opinion occurs the following statement:

> "It was learned [during the legislative investigation preceding the Act of September 26, 1950] that if the Canal were operated at cost, the tolls would have to be raised to a prohibitive level."

This statement also was taken almost word-for-word from a sentence in petitioner's brief, a sentence on page 14. Again, the sentence is incorrect and is not supported by the citations to the Record given by petitioner at page 14.

This statement may have the most serious consequences for respondents, because it seems to imply that respondents are trying to get tolls fixed at less than cost. The contrary is true. All that respondents seek is a fair allocation to Canal transit of the aggregate costs of the combination of national defense, overseas military base and ship canal which the United States operates at Panama.

Congress fully appreciated this problem. As can readily be seen from an examination of House Resolution 44* annexed hereto as Appendix B, which initiated the Congressional investigation which led to the Act of September 26, 1950, the whole purpose of that Act was to allocate to tolls their proper share of this aggregate cost.

But to return to petitioner's incorrect statement on page 14 of its brief. Petitioner cites the hearings on the bill that became the Act of 1950 at R. 109 and R. 126, and in particular the testimony of Mr. Seidman, the representative of the Bureau of the Budget. But it is entirely clear from Mr. Seidman's testimony that what would require that tolls be "raised" was not "cost," but the "existing for-

* 81st Cong. 1st Sess. (95 Cong. Rec. 1617).

mula" and that the existing formula included elements properly allocated to the military and the Government as distinguished from commercial transits. As to the interest rate, the existing formula provided an arbitrary 3%, whereas the new act was to provide interest at cost. *In other words, the objective of the Act was to achieve the proper cost of Canal transits, not to relieve tolls of any proper cost.*

Mr. Seidman's testimony at R. 109-110 was as follows:

> "*Under the existing formula*, revenues from tolls, together with profits from the Canal's business operations and miscellaneous civil revenues, are supposed to produce an amount sufficient to cover:
>
> "1. A 3-percent return on a capital investment of approximately $534,000,000 in the Panama Canal, including the investment in civil government, health and sanitation facilities. (This is a book figure and interest is not actually paid to the Treasury.)
>
> "2. The costs of operating and maintaining the Canal.
>
> "3. The net cost of civil government, health, and sanitation, including the cost of school facilities provided for children of military personnel and personnel employed by the military.
>
> "4. The cost of transiting military and Government vessels through the Canal.
>
> "The objective of the present formula has not been achieved in practice and the Canal accounts reflect substantial losses.
>
> "I think that has been so almost since the time this formula has been followed.
>
> "If the Canal were to be made self-sustaining *on this basis*, tolls would have to be increased to at least $1.40 a ton.

"Several basic changes are made in this formula by H. R. 8677, considered in connection with Public Law 808, which was the charter of the Panama Railroad Company. This act is primarily an amendment to the Panama Railroad charter. Under the new formula, revenues from tolls would be expected to cover:

"1. Interest at the 'going' rate (approximately 2.3 percent at the present time) on the capital investment in the Panama Canal, excluding the amount of any investment in national defense and civil government facilities and extraordinary expenditures or losses incurred through national policy and not related to the Company's operations. The Company would be required actually to pay interest to the Treasury.

"There would be offset against the amount of the investment subject to interest a proportionate share of the dividends which have been paid into the Treasury by the Panama Railroad Company. These amount to approximately $38,000,000. I think that figure is a little high. That is now provided for under existing law. Under the House amendment, there would also be excluded from the investment approximately $129,000,000, representing interest during the construction period.

"2. The costs of operating and maintaining the Canal—that is the same in both formulas.

"3. Approximately 50 percent of the net costs of civil government, health and sanitation. The remainder of these costs would be borne by the other corporate divisions such as the railroads, hotels, harbor terminals, steamship lines, utilities, commissaries, etc., out of revenues derived from the sale of goods and services."

Thus the quotation shows the incorrectness of petitioner's assertion at page 14 that "it was discovered that,

if the Canal were operated at cost, the tolls would have to be raised to $1.40, a clear prohibitive figure." (This quotation shows clearly, respondents believe, what was meant by "costs of maintaining and operating the Canal.")

Respondents therefore respectfully request the elimination of the word "cost" from the sentence on page 3, and the substitution of the words "preexisting formula".

III. Statements that "it is at least arguable that Congress has sided with petitioner" because Congress has "approved . . . budgets . . . based on petitioner's interpretation of the statute," citing 69 Stat. 235-237, 70 Stat. 322-324, 71 Stat. 78.

The statements quoted above appear on page 9.

Respondents submit that Congress's attitude was one of studied neutrality that does not warrant the expression "at least arguable." Of course anything is "arguable."

But the statutory references do not use the word "approve." Congress, in accordance with 31 U. S. C. §849, "authorized . . . expenditures" but only "within the limits of funds and borrowing authority available to it and in accord with law" by the cited statutes.

The report of the Senate Interstate and Foreign Commerce Committee after the hearings referred to at footnotes 3 and 4 of the opinion,* stated at page 25 that it did not wish "to legislate on the key words that are now the subject of litigation." On page 26, referring to "Business losses," the report said: This is the issue in litigation and

* The report itself is referred to at footnote 4.

the committee do not feel that it is proper to legislate in this field while the litigation is in process." These references are the only explicit expressions from Congress or any committee on this question.

The Comptroller-General repeatedly urged Congress to amend Section 412(b) so as to permit absorption of the business losses. R. 47, 240. Congress refused to act.

Respondents respectfully request that the words "at least" be eliminated from this sentence of the opinion.

Respondents are fearful that their retention will give petitioner an undeserved headstart in any future litigation in this area.

Respectfully submitted,

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Appendix A.

Table 4.—Canal and Other Marine Operations—Operating Income, Year Ended June 30, 1954

	Direct expenses including cost transfers	Allowance for depreciation	
REVENUE:			
Canal tolls			$33,302,149
Credit for tolls on U. S. Government vessels			3,888,957
Harbor pilotage, tug, launch, and other services			2,874,650
Total revenue			40,065,756
OPERATING EXPENSES:			
Navigation services and control	$ 5,087,034	$ 227,374	
Locks operation and maintenance	4,364,820	977,824	
Provision for periodic overhaul of locks	1,080,800		
Dredging of channel and harbors	2,174,419	361,513	
Meteorology and hydrography	343,152	482	
Operation and maintenance of dams, reservoirs and spillways	106,727	150,152	
Operation and maintenance of ferry across canal	464,646	35,490	
Annuity to Republic of Panama (repayment to U. S. Treasury)	430,000		
Damage to vessels	86,186		
Other operating expenses	188,622	24,656	
Total operating expenses	14,326,406	1,777,491	16,103,897
Less costs transferred to other activities			301,982
Net operating expenses			15,801,915
OPERATING INCOME (table 3)			24,263,841

The accompanying "Notes Pertaining to the Financial Statements" are an integral part of this statement.

House Resolution 44, 81st Cong. 1st Sess., adopted February 28, 1949 (95 Cong. Rec. 1617)

Whereas it is the responsibility of the Congress of the United States to establish the policy to be followed in prescribing the tolls that shall be levied for the use of the Panama Canal; and

Whereas there have been substantial changes in economic conditions since Congress last established such policy, including the effect of such tolls upon American shipping: Therefore be it

---

Resolved, That the Committee on Merchant Marine and Fisheries or any duly authorized subcommittee thereof is authorized to make a full and complete study and analysis of the financial operation of the Panama Canal with particular reference to the proper accounting and allocation of costs attributable to—

(a) the transit of the Canal by commercial, governmental, and military vessels of United States and foreign nations;

(b) military activities of the United States in and connected with the Canal Zone;

(c) United States civil government, including, but not limited to, sanitation, public schools, playgrounds, hospitals, and so forth;

(d) business operations conducted under the supervision of the Governor General of the Panama Canal by the various business units of the Panama Canal and Panama Railroad Company;

and to recommend to the Congress concerning what elements of cost should be properly used in the future as the basis of a policy to be followed in establishing and levying tolls for the use of the Panama Canal for transit purposes.

Resolved, That the President of the United States be, and hereby is, requested to defer until after submission of the committee's report any change in tolls currently levied for the use of the Panama Canal.

MOTION FILED MAR 13 1958

Nos. 251 and 252.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

PANAMA CANAL COMPANY,

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v.

GRACE LINE, INC., *et al.*

GRACE LINE, INC., *et al.*,

Cross-Petitioners,

v.

PANAMA CANAL COMPANY.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION OF AFL-CIO MARITIME COMMITTEE FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

Nos. 251 and 252.

PANAMA CANAL COMPANY,

Petitioner,

v.

GRACE LINE, INC., *et al.*

GRACE LINE, INC., *et al.*,

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v.

PANAMA CANAL COMPANY.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION OF AFL-CIO MARITIME COMMITTEE FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*.

AFL-CIO Maritime Committee respectfully moves for leave to file a brief as *amicus curiae* in this case. The attorneys for respondents cross-petitioners, Grace Line, Inc., *et al.* (herein "respondents") have consented to the filing,

but the Solicitor General on behalf of petitioner cross-respondent, Panama Canal Company (herein "petitioner"), has so far failed to answer a request for consent, and the failure is assumed to be a refusal.

The AFL-CIO Maritime Committee (herein "Committee") is an organization of long-established standing. It antedates by many years the formation of the AFL-CIO, but is today a recognized department of that federation. The headquarters of the committee are in Washington, D. C. Dedicated to advancing and protecting the interests of organized seamen employed aboard American flag vessels, the Committee actively oversees legislation, administrative and executive action, litigation, and many other public and private deeds that affect the lives of seamen. The Committee supports all sound programs to increase the number of operating American-flag vessels and otherwise improve the economic vitality of the American maritime industry with consequent benefit to the national interest and working forces who follow the sea as a calling.

Because this case may be the means for causing a substantial reduction in Panama Canal tolls, the Committee has a tangible interest in its outcome. Toll reduction is the long-awaited stimulus to intercoastal dry-cargo shipping, which has been languishing for years. An increase in this shipping means new desirable job opportunities for seamen. This is a welcome development because job shortage is a severely chronic condition of the maritime industry and shows signs only of worsening in the future. As a result newcomers to the employment market are discouraged from learning the crafts of seamanship and in time of national need there is danger of shortage of skilled seamen.

In its brief to this Court, petitioner argues that a decrease in Panama Canal tolls will cause railroads either

to lower their transcontinental freight rates or yield a substantial portion of long-haul traffic to water-borne carriers. This development, petitioner strongly implies, would undermine "national transportation policy."

The Committee is anxious to treat with this point as an *amicus*. Petitioner evidently favors the sacrifice of intercoastal shipping to the competitive advantage of railroads.

Statistics show a drastic decline in the volume of intercoastal traffic over the years. Many shipping companies have been forced to shut down operations altogether, with consequent sharp curtailment of job opportunities in the industry.

The Committee is of the firm conviction that the lowering of Panama Canal tolls in accordance with statutory mandates will directly promote rather than undermine "national transportation policy."

The only way that the Committee can insure that its position on the competing claims of the railroad and maritime industries will be presented to this Court is to intervene as an *amicus*. The Committee has not seen the brief that respondents will file in this Court, and there is no assurance that respondents will make the arguments the Committee wishes to make in the way the Committee wishes to make them. The Committee has no pecuniary interest in this case and is, therefore, in a better position than the actual litigants to set forth objectively the far-reaching economic impact of the decision, particularly as it affects seagoing personnel.

Additionally, the committee speaks from the broad concern of organized labor—a concern which so far has been unheard from in this case although bound to be profoundly affected by the outcome.

If leave to file a brief is granted, the committee respectfully requests that it be afforded two weeks from the date

of receipt of notice that the leave has been granted to complete, print, and file the brief. The last day for respondents to file their brief is March 22, 1958.

Respectfully submitted,

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SUPREME COURT, U. S.

MOTION FILED MAR 1 8 1958

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 251

PANAMA CANAL COMPANY, *Petitioner,*

v.

GRACE LINE, INC., *et al., Respondents.*

No. 252

GRACE LINE, INC., *et al., Petitioners,*

v.

PANAMA CANAL COMPANY, *Respondent.*

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION OF INTERCOASTAL STEAMSHIP FREIGHT ASSOCIATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

INTERCOASTAL STEAMSHIP FREIGHT ASSOCIATION

By ODELL KOMINERS,
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March 18, 1958.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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v.

GRACE LINE, INC., *et al., Respondents.*

No. 252

GRACE LINE, INC., *et al., Petitioners,*

v.

PANAMA CANAL COMPANY, *Respondent.*

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

---

MOTION OF INTERCOASTAL STEAMSHIP FREIGHT ASSOCIATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Intercoastal Steamship Freight Association respectfully applies to the Court for leave to file a brief as *amicus curiae* on the argument of this case.

Respondents, cross-petitioners Grace Line, et al., have consented to the filing of such brief, but petitioner, cross-respondent Panama Canal Company, has refused.

NATURE OF THE ASSOCIATION'S INTEREST

The Intercoastal Steamship Freight Association is an unincorporated association of shipping companies operating under the United States flag in the intercoastal trade, including nearly all the common carriers in this trade. The term "intercoastal trade" refers to the trade between the East and West Coasts of the United States through the Panama Canal.

The interest of the Association in Panama Canal Tolls is apparent.

REASONS FOR THE SUBMISSION OF A BRIEF

The purpose of applicant's brief is to correct certain factual misapprehensions appearing at pages 67-68 of the brief for Panama Canal Company. It is apparent from those pages that the authors of the Panama Canal Company brief have little knowledge of the intercoastal shipping business and of the rail-water competitive situation. Applicant wishes to inform this Court of the true facts.

The factual misapprehensions to which applicant refers are Panama Canal Company's statements that (1) a "substantial decrease [in tolls] would enable the steamship lines considerably to lower their rates," and (2) the transcontinental railroads "would be confronted with the choice of either losing a sizeable portion of their long-haul business or of lowering their rates."

Counsel for respondents, cross-petitioners Grace Line, et al. [Mr. C. Dickerman Williams] has advised that his brief is not yet available. He has further advised that he is not familiar with the factual matters thus alleged by Panama Canal Company, that there is nothing in the Record on the subject.

Accordingly, it is respectfully requested that this application for leave to file a brief as *amicus curiae* be granted.

Respectfully submitted,

INTERCOASTAL STEAMSHIP FREIGHT ASSOCIATION

By ODELL KOMINERS,
Counsel.

March 18, 1958.

BRIEF AMICUS CURIAE FOR INTERCOASTAL STEAMSHIP FREIGHT ASSOCIATION

This brief is filed by *amicus curiae*, Intercoastal Steamship Freight Association, which includes in its membership nearly all of the common carriers by water operating between the Atlantic and Pacific Coasts of the United States by way of the Panama Canal.

The purpose of this brief is to prevent becoming embedded in the archives of this Court, and in the minds of the justices thereof, certain factual misapprehensions set forth on pages 67-68 of the brief for the Panama Canal Company filed by J. Lee Rankin, Solicitor General of the United States, *et al.*, in *Panama Canal Company, Petitioner, v. Grace Line, Inc., et al.*, and *Grace Line, Inc., et al., Cross-Petitioners* v. *Panama Canal Company*, on Writs of Certiorari to the United States Court of Appeals For the Second Circuit.

The pages in the Panama Canal Company brief referred to by us state as facts (1) that the "substantial decrease (in tolls) would enable the steamship lines considerably to lower their rates" and (2) that the transcontinental railroads "would be confronted with the choice of either losing a sizeable portion of their long-haul business or of lowering their own rates." Counsel for the Panama Canal Company adds: "In view of the present financial difficulties of the railroads, the question would arise whether such a result would be in accord with the National Transportation Policy expressed in Section 1 of the Transportation Act of 1940, 54 Stat. 899, 49 U.S.C. Ch. 1, note."

We respectfully bring to this Court's attention the fact that the National Transportation Policy referred

to gives no greater weight to rail transportation and its needs than to water transportation. Moreover, the factual competitive situation of the railroads versus the intercoastal carriers, who transit the Panama Canal and are the water competitors of the transcontinental railroads referred to, is quite different from that conceived by the authors of the Panama Canal Company brief.

The transcontinental railroads have been substantially gaining and the intercoastal carriers losing coast to coast traffic. Prior to World War II, or in 1940, the total cargo carryings in the intercoastal trade were 7,540,157 net tons (reported in Report 317 of the Division of Economics and Statistics of the United States Maritime Commission as 6,732,283 long tons). At the present time the intercoastal carriers, formerly regulated by the United States Maritime Commission, are regulated by the Interstate Commerce Commission. The latest annual figures released by that Commission on intercoastal carryings are for the year 1956, and the figure is 4,246,372 net tons, a *decrease* of 43.7 percent from 1940.

Complete statistical material as to transcontinental railroad traffic in 1940 is not available. However, the current tendency of traffic moved by such railroads in competition with the intercoastal carriers can be determined by using Statements 5142 and SS-1 of the Bureau of Transport Economics and Statistics of the Interstate Commerce Commission for the years of 1950 and 1955 (1955 being the latest year for which these Statements have been issued). These Statements are Carload Waybill Statistics on freight moved by the railroads so segregated as to show the states between which the railroads carried the freight. These

waybill studies are based upon a one percent sampling of the waybills of the railroads. By following accepted procedure and multiplying figures contained therein by 100 the transcontinental movement in 1950 between the states normally served by the intercoastal carriers,[1] based on these studies, was 8,380,600 net tons, while for 1955 it was 10,193,300 tons, an *increase* of 21.6 percent. For the railroads as a whole, in the United States, the 1950 total carryings were 2,570,153,391 tons and for 1955 they were 2,606,504,107 tons, an *increase* of 1.41 percent. On the other hand, for the year 1950 the actual intercoastal carryings as shown in the Bureau of Transport Economics and Statistics Statement Q-650 (QWS), issued by the Interstate Commerce Commission, were 4,720,073 net tons, as compared with only 4,147,703 net tons in 1955, a *decrease* of 12.1 percent.

The only relevant case cited by Panama Canal Company asserted that the shipping lines needed relief. This case is *Transcontinental Rail Rates*, 268 I.C.C. 567, 571. The decision in that proceeding quotes the War Shipping Administration (page 569) as saying that from their experience in the intercoastal trade they had "become fully aware of the destructive impact of water-competitive rail rates upon the operations of domestic shipping", and were "compelled to the conclusion that successful and profitable operation of domestic shipping in the post-war period is not possible, even under the most favorable traffic conditions, unless readjustments are made in competitive rail rates

[1] States normally served by these intercoastal carriers are Washington, Oregon and California on the one hand, and on the other the states of Connecticut, Delaware, Florida, Georgia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Vermont, Virginia, West Virginia and the District of Columbia.

to permit vitally necessary readjustments in the water rates."

On page 68 of the Panama Canal Company brief, the statement is made:

"Respondents (the ocean carriers) demand that the Canal tolls be reduced 26½ per centum, or 24¢ per ton. This substantial decrease would enable the steamship lines considerably to lower their rates."

In fact, a 24 cents per ton decrease in tolls involved would not permit a "considerable" reduction in rates.

Panama Canal tolls are based on so-called "net vessel-tons of one hundred cubic feet each of actual earning capacity determined in accordance with the rules for the measurement of vessels for the Panama Canal" (See the citation on page 4 of the Panama Canal Company brief); and not on cargo tons, as the authors of the brief seemingly suggest in the quoted matter above in arriving at a figure of "24¢ per ton." Canal tolls are now 90 cents, and a decrease of 26½ percent would amount to 23.85 cents per net vessel-ton of one hundred cubic feet. Even if this reduction produced an equivalent of this amount per *cargo* ton, to reflect it by a reduction in freight rates would mean a reduction in our freight rates of only 1.2 cents per 100 pounds. Actually, since the space in the ship occupied by the type of cargo available to the intercoastal carriers averages much less than 100 cubic feet to the ton, the reduction in tolls "demanded" by the intercoastal carriers would average less than three-quarters of a cent per 100 pounds of cargo, or only a fraction of one percent of the present average freight rate of $1.25 per 100 pounds. This is a far cry from the claim on page 68 of the Panama Canal Company's brief that

the reduction in tolls "would enable the steamship lines considerably to lower their rates."

As stated by the Interstate Commerce Commission in its 71st and latest annual report:

> "Although the rates of such carriers [intercoastal] are not to any general extent held down by our maximum rate orders, the carriers are limited in their efforts to obtain additional revenue by the rates of competitive land carriers which often have the effect of a rate ceiling." (71st Annual Report of the Interstate Commerce Commission, fiscal year ended June 30, 1957, at page 7.)

Although Panama Canal tolls have a negligible relation to rates, because of the extremely low profit margin upon which the intercoastal carriers are forced to operate the tolls are very large in relation to net income. Such a toll reduction may indeed be necessary to permit some of the marginal carriers to survive.

Respectfully submitted,

INTERCOASTAL STEAMSHIP FREIGHT ASSOCIATION

By ODELL KOMINERS,
Counsel.

March 18, 1958.

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Nos. 251 and 252

IN THE

Supreme Court of the United States

October Term, 1957

No. 251

PANAMA CANAL COMPANY,

Petitioner,

v.

GRACE LINE, INC., *et al.*,

No. 252

GRACE LINE, INC., *et al.*,

Cross-Petitioners,

v.

PANAMA CANAL COMPANY.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR AKTIESELSKABET DAMPSKIBSSELSKABET SVENDBORG, AKTIESELSKABET DAMPSKIBSSELSKABET "VESTERHAVET", AUSTRALIND STEAM SHIPPING CO., LTD., BLUE STAR LINE, LTD., COMPANIA COLOMBIA DE NAVIGACION MARITIMA, LTDA., COURT LINE, LTD., DAMPSKIBSSELSKABET AF 1912 AKTIESELSKAB, IVARANS REDERI A/S, MARINA MERCANTE NICARAGUENSE, S. A., NEW ZEALAND SHIPPING CO., LTD., PORT LINE, LTD., REDERIET "OCEAN" AKTIESELSKAB, WESTFAL-LARSEN & CO., A/S, AND WILH. WILHELMSEN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS AND CROSS-PETITIONERS GRACE LINE, INC., *ET AL.*

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Amici, representative foreign shipowners, respectfully file this brief with the consent of the parties pursuant to Rule 42, Paragraph 1 of the rules of this Court.

Opinions Below and Jurisdiction

The opinions below and the grounds for the jurisdiction of this Court are correctly stated on pages 1 and 2 of the Panama Canal Company brief.

Questions Presented

Amici are interested in the following two broad questions presented:

1. Does the statutory provision that toll rate changes are to be approved by the President override the Hay-Pauncefote Treaty requirement that tolls be "just and equitable" so as to prevent judicial review of Panama Canal tolls? (Panama Canal Company brief Questions Nos. 1(a) and 1(e); Grace Line, Inc. Petition Questions Nos. 1 and 2).

2. May a public utility (here the Panama Canal Company) avoid liability for past excessive charges because its rates are subject to executive or administrative approval? (Question No. 3 in Panama Canal Company brief; Question No. 4 in Grace Line petition)

Statutes Involved

1. Canal Zone Code, Title 2, Sections 411 and 412, as amended by the Act of September 26, 1950, 64 Stat. 1038.

2. The Hay-Pauncefote Treaty, proclaimed by the President on February 22, 1902, 32 Stat. 1903.

The statutes involved are printed in full on pages 3 through 7 of the Panama Canal Company brief.

Statement

As the Court of Appeals observed (fn. 9) the use of the Panama Canal by foreign shipping has greatly increased. The General Accounting Office 1955 Audit Report shows that the commercial tolls collected have increased as follows:

Tolls Revenue	Foreign Flag	U. S Flag
1955	$23,442,170	$10,407,307
1952	16,935,823	9,986,708

Since canals, like toll highways, operate with rather rigid costs, an increase in volume may be expected to result in lower tolls. This has happened, for instance, at Suez. There, following the post World War II trade activity, Suez Canal tolls were reduced during private operation after 1946 about 40%. In turn the increase in volume at Suez has been greater than at Panama, partly at least due to traffic generated by the lower rates. That the increase noted by the Court of Appeals is continuing is shown by the fact that in 1956 the foreign flag and U. S. flag commercial tolls had increased to $25,410,164 and $10,808,921 respectively.[1]

The foreign policy of the United States is in favor of international trade as a means of promoting international communication, without which there can be no international cooperation.

Amici are concerned with suggestions that as aliens they have no standing to question the President's performance of his discretionary duties. That question is not in this case. Here the President has taken no action; he has been unable to act because there have been no hearings as

[1] Panama Canal Company report for fiscal 1956, pp. 47, 63.

to toll rates since the act of September 26, 1950. Nowhere has the Canal Company been able to find authority for its point that toll rates considered "just and equitable" in 1950 are, entirely absent economic proof, to be considered without judicial review "just and equitable" in 1958.

POINT I

Charging non-Canal losses against Canal operation for tolls-fixing purposes deprives the Canal users of the lower toll which would otherwise result and is contrary to the progressive public policy of trade, not aid.

The opinion of the Court of Appeals and the briefs of the plaintiffs have demonstrated beyond doubt that Section 412(b), Title 2, of the Canal Zone Code,[2] as shown both by language and legislative history do not contemplate that Canal operation be burdened, or affected, by non-Canal activities. Yet the Panama Canal Company, as shown by the Audit Reports of the General Accounting Office, has deprived Canal users of the benefits which the Canal users would otherwise receive by loading on Canal operations the losses of these other activities.

The result is unfair to Canal users and unlawful under the laws of the United States. It is moreover a most unfortunate precedent to set for other nations, many of which are under far greater pressures than the United States to exploit for purposes of national policy assets properly dedicated, like the Panama Canal, to the welfare of the world community.

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[2] Printed in Panama Canal Company brief at pp. 4-5.

POINT II

Presidential discretion is not involved in this case.

The Act of September 26, 1950, established a formula whereby Panama Canal tolls were to be based on canal operating costs, including a proportion of the costs of the Canal Zone Government, but excluding the costs, and necessarily also the profits, if any, of the non-canal activities, such as the hotels, commissaries, railroad, etc. The tolls were to be reviewed at hearings at which these defined canal operating costs were to be presented according to the regular administrative procedure, and the toll changes were to be subject to presidential approval. But no hearings have been held. In 1953 Congress directed the Panama Canal Company to complete its current study regarding the adequacy of the Canal tolls.[3] The Company replied that it had the matter under study and that it would propose new toll rates, as the Panama Canal Company brief admits, "whenever it should conclude that changes in rates were indicated and necessary".[4] Thus it has been the decision of the Canal Company, not of the President, to maintain the current rates, and the Company has been primarily concerned with raising tolls, not with having the tolls reflect operating costs.

In any event fixing Panama Canal tolls does not involve the exercise of the executive function as does the assignment of airline routes. By the Hay-Pauncefote

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[3] Page 17, Panama Canal Company brief, fn. 39, see Statement of the Managers on the Part of the House, accompanying the Conference Report on the Civil Functions Appropriations Bill, H. Rept. 889, 83rd Cong., 1st Sess., p. 10.

[4] Page 18, Panama Canal Company brief, A1995, fn. 40, 100 Cong. Rec. (Daily Ed.), printed in appendix to Panama Canal Company brief at pp. 173-176.

Treaty the United States adopted as the basis for the neutralization of the canal that the canal should be open to all on terms of entire equality without discrimination and with just and equitable conditions and charges.[5] Thus approval of tolls is an administrative and ministerial act, not an act involving executive election such as is involved when the President first negotiates an international agreement for an airline route (Cf. *Chicago & Southern* v. *Waterman*, 333 U. S. 103, relied on by the Canal Company) and then allocates this route to an American airline. There a choice must be made between one of several applicants. Under the international agreements usually only one carrier can be chosen, and discrimination is mandatory. Our laws require in assigning routes a personal choice by the President in the interests of national policy to protect the best interests of American airlines, while, as forcefully stated by Senator Elihu Root, we have renounced Panama Canal tolls as an item of national policy. We covenanted to advance world civilization rather than to promote American interests.[6] We also relinquished the internal economic considerations relied on in the argument propounded on pages 34 and 68 of the Panama Canal Company brief.

Both the President and the toll hearings are limited as to the evidence to be considered to Canal operating costs, plus a share of the cost of the Canal Zone Government. The relative welfare of American, Canadian or Mexican transcontinental railways, the economic differentials of trade to Atlantic as against Pacific ports, or the promotion of American exports are all excluded because, by treaty and statute the United States is bound to have tolls reflect costs and to have tolls uniformly applied to all ships in all trades. Preferential treatment to nations or to commodities is prohibited.

---

[5] 32 Stat. 1903, Art. III, printed in Panama Canal Company brief at pp. 6-7.

[6] 46 Cong. Rec. 1822.

To excuse the Company's failure to comply with the treaty and statute under the guise of absence of judicial review is to surrender the present leadership the United States enjoys among nations observing their international obligations.

POINT III

The United States treaty obligations in the Hay-Pauncefote Treaty require that damages for the Panama Company's disregard of law and consequent collection of excessive tolls should be awarded Canal users, certainly as that treaty was implemented by the Act of September 26, 1950.

The Hay-Pauncefote Treaty, expressly modeled on the Constantinople Convention of 1888, calls for "just and equitable charges".[7] Clearly this means that if unjust and inequitable charges are collected, the excess should be refunded.

Even more clearly Courts here are traditionally the arbiters of what is "just and equitable". To relinquish this function to the executive would be an unfortunate international example.

By the Act of September 26, 1950[8] Congress explicitly defined "just and equitable". That definition was in no way remarkable: it provided for a toll sufficient to pay costs of operations and a return on investment measured by historical cost.

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[7] 32 Stat. 1903, Art. III, printed in Panama Canal Company brief at pp. 6-7.

[8] 64 Stat. 1038, printed in Panama Canal Company brief at pp. 3-6.

That Act also transferred the Canal to a corporation fully subject to suit and incorporated the "just and equitable charges" provision of the Hay-Pauncefote Treaty in the laws of the United States (Section 12, Amending Section 412(d), Title 2, Canal Zone Code).

It is well-settled in Anglo-American jurisprudence that the user of a public utility who is charged an excessive rate is entitled to reparation in the amount of the excess. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 436.

Accordingly the duty of restitution which would formerly have been a matter of international negotiation is now judicially enforceable in the courts of the United States.

To deny relief for past over-charges on the ground that there was no way of telling how the President would have exercised his Section 411 review power imputes to the President an extra legal function not called for by this legislation. To construe the Act of 1950 as authorizing the President to abrogate rather than enforce its policy is inconsistent with the basic concepts of the language of the statute, the legislative history and the Constitution.

There is no provision for discrimination in toll rates between ships of different nationalities. The President is given no power to retaliate, as far as Panama Canal tolls are concerned, against any foreign action. Such activity is reserved to other spheres. Consequently, policies involving air line routes and tariffs do not apply.

CONCLUSION

The decision of the Court of Appeals should be affirmed in so far as it requires the Panama Canal Company to proceed to recompute tolls and reversed in so far as it denies damages for past excessive charges.

Respectfully submitted,

JAMES M. ESTABROOK,
Counsel for Amici Curiae Aktieselskabet Dampskibsselskabet Svendborg, Aktieselskabet Dampskibsselskabet "Vesterhavet", Australind Steam Shipping Co., Ltd., Blue Star Line, Ltd., Compania Colombia de Navigacion Maritima, Ltda., Court Line, Ltd., Dampskibsselskabet af 1912 Aktieselskab, Ivarans Rederi A/S, Marina Mercante Nicaraguense S. A., New Zealand Shipping Co., Ltd., Port Line, Ltd., Rederiet "Ocean" Aktieselskab, Westfal-Larsen & Co., A/S, and Wilh. Wilhemsen in support of Grace Line, Inc., et al., Respondents and Cross-Petitioners.

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BRIEF OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, *AMICUS CURIAE*

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Supreme Court of the United States

OCTOBER TERM, 1957

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GRACE LINE, INC., *et al.*, *Cross-Petitioners*

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PANAMA CANAL COMPANY

BRIEF OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, *AMICUS CURIAE*

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Statement

This brief, *amicus curiae*, is filed by The Government of the United Kingdom of Great Britain and Northern Ireland, as a signatory to the Hay-Pauncefote Treaty of November 18, 1901, between the United States and Great Britain, because some of the issues in this case involve the spirit and obligations of that treaty, the common and his-

torical interpretation by both signatories of its provision for tolls, and the free flow, on a just and equitable basis, of international commerce through the Panama Canal, which is of vital concern to all nations, including the United Kingdom.

It would not be appropriate for this brief to deal with the domestic legal issues, procedural problems and accounting methods involved. But it does seem appropriate and of the highest importance, and it is respectfully hoped, of some help to this Honorable Court, that this brief recall and point out certain international obligations, and their interpretation, which were established by negotiation between the signatories to the Hay-Pauncefote Treaty and which the United States assumed as a "mandatory for civilization". The continued observance of these obligations—and their common interpretation—are vital to world trade and to the maintenance in international relations of the Rule of Law.

POINT I

The obligations of Article III, Section 1, of the Hay-Pauncefote Treaty should be maintained in this case.

Article III, Section 1, provides:

> "The United States adopts, as the basis of the neutralization of such ship canal, the following rules, substantially as embodied in the Convention of Constantinople, signed the twenty-ninth of October, 1888, for the free navigation of the Suez Canal, that is to say:
>
> 1. The canal shall be free and open to the vessels of commerce and of war of all nations observing these rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic or otherwise. Such conditions and charges of traffic shall be just and equitable." (32 Stat. 1903).

The basic principle that the conditions and charges of traffic shall be just and equitable was willingly adopted by both signatories to the Hay-Pauncefote Treaty from Article VIII of the Clayton-Bulwer Treaty of 1850 (Canal Zone Code, p. 833). The principle was not a rhetorical flourish. It has been stated, in slightly varying form and with impressive authority by responsible statesmen of both nations as a basic, working condition to the maintenance of any canal across the Isthmus. As early as 1826, Secretary of State Henry Clay, in his instructions to the delegates to the Panama Congress, said "If a canal across the Isthmus be opened so as to admit of the passage of sea vessels from ocean to ocean, the benefit of it ought not to be exclusively appropriated to any one nation, but should be extended to all parts of the globe upon the payment of a just compensation or reasonable tolls." (IV, Proceedings of International American Congress, 144). The exact wording of the principle in Article III, Section 1, was apparently suggested by the British Foreign Minister, Lord Lansdowne, and "was regarded by the President as so entirely reasonable that it was agreed to without discussion." Document No. 746, 61st Cong. 3d Sess. p. 9. Moreover, the principle so clearly emphasized in both the Clayton-Bulwer and Hay-Pauncefote treaties was specifically incorporated in Article 18 of the Hay-Bunau-Varilla Treaty of 1903, between the United States and Panama, which provides: "The Canal, when constructed, . . . shall be opened upon the terms provided for by Section 1 of Article 3 of, and in conformity with all the stipulations of, the treaty entered into by the Governments of the United States and Great Britain on November 18, 1901." (33 Stat. 2234).

This principle of "just and equitable" tolls is a basic part of the long and honorable record of negotiations between Britain and America about the building and operation of a canal across the Isthmus of Panama. And those negotiations form one of the most reassuring chapters in the history of Anglo-American relations. Britain's faith in the unselfish attitude and the practical capacity of the

United States with regard to international commerce across the Isthmus led her to agree to the Clayton-Bulwer Treaty of 1850 for a partnership in the problem. In 1901, under the Hay-Pauncefote Treaty, the United States assumed, subject to certain obligations, the sole responsibility. In 1914, by the conclusion of the so-called "Panama Canal tolls controversy", the United States again demonstrated her scrupulous attitude as a trustee for civilization and affirmed that the Rule of Law is as vital an element in international as in domestic affairs.

It is respectfully urged that the particular problems of this case should be considered in the light of the basic and enduring position of the United States in meeting its obligations under the Hay-Pauncefote Treaty, as expressed by President Woodrow Wilson and U. S. Senator Elihu Root. In his address to a joint session of Congress on March 5, 1914, President Wilson, in referring to these obligations, said: "We consented to the treaty; its language we accepted, if we did not originate it; and we are too big, too powerful, too self-respecting a nation to interpret it with a too strained or refined reading of the words of our own promises just because we have power enough to give us leave to read them as we please." Senator Root, in his classic address of January 21st, 1913, to the United States Senate, said: "By public declarations, by the solemn asseverations of our treaties with Colombia in 1846, with Great Britain in 1850, our treaties with Nicaragua, our treaty with Panama in 1903, we have presented to the world the most unequivocal guaranty of disinterested action for the common benefit of mankind and not for our special selfish advantage." (49 Cong. Rec. 1821-2). And again: "We could not have taken it (the Canal Zone) for our selfish interest; we could not have taken it for the purpose of securing an advantage to the people of the United States over the other peoples of the world. It was only because civilization had its rights to passage across the Isthmus and because we made ourselves the mandatory of civilization

to assert those rights, that we are entitled to be there at all." (49 Cong. Rec. 1822).

The Government of the United Kingdom is content to rest on those statements of the basic obligations of the United States under Article III, Section 1, of the Hay-Pauncefote Treaty.

POINT II

"Just and equitable" tolls should be limited "to the amount representing the fair value of the services rendered, i.e., to the interest on the capital expended and the cost of the operation and maintenance of the Canal."

This interpretation of Article III, Section 1, of the Hay-Pauncefote Treaty was given by Sir Edward Grey in his memorandum of November 14th, 1912, delivered to the United States Secretary of State, Philander C. Knox, when Britain and the United States disagreed about the exemption from tolls of American coastwise shipping. The interpretation met with no dissent from the Government of the United States at that time (although it did differ strongly with Sir Edward Grey's arguments about the exemption problem). Since then it has apparently been the commonly accepted formula, in America as well as in Britain, for determining "just and equitable tolls". An accurate interpretation was given in 1937 in a United States Senate committee hearing by H. A. A. Smith, Chief of Office and General Purchasing Officer, Panama Canal, who stated the formula, on behalf of the operating officials of the Canal, as follows:

> "If the Canal is to be operated and maintained on a self-sustaining basis it is essential that tolls, which constitute all but a negligible portion of the revenues of the canal, should be established in relation to the capital cost of the canal and the cost of its operation and maintenance.

> The principle is now well recognized that the Panama Canal is not to be regarded as a public improvement from which no direct return is to be expected, but is to be considered and operated as a great utility of international character, constructed and maintained by the United States for the benefit of all nations upon the terms of equality prescribed by treaty, for which all commercial vessels using the canal may be expected to pay tolls which are commensurate with the costs incurred in the construction, operation, and maintenance of the canal.'"*

But the most reassuring example of the interpretation by the United States Government of "just and equitable" tolls, in accordance with the letter and spirit of Article III, Section 1, of the Hay-Pauncefote Treaty, and the memorandum of Sir Edward Grey, is in the Act of Congress of September 26th, 1950 (Canal Zone Code, Section 412 (b)) which provides:

> "Tolls shall be prescribed at a rate or rates calculated to cover, as nearly as practicable, all costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto, including interest and depreciation, and an appropriate share of the net costs of operation of the agency known as the Canal Zone Government."

This formula is substantially that stated, without American dissent, by Sir Edward Grey, in 1912. It is admirably fortified by Senate Report No. 2531 (September 8th, 1950) as follows:

> "Basically, the primary purpose of the bill is to separate the business operations of the Panama Canal from those collateral operations which make

* Hearings before the Subcommittee of the Committee on Interoceanic Canals, United States Senate, Seventy-Fifth Congress, First Session on S. 1912, a bill to provide for the measurement of vessels using the Panama Canal, etc., and S. 2493, a bill to provide a permanent and equitable method of assessing tolls upon vessels transiting the Panama Canal, etc. P. 6, Govt. Print. Off. 1937.

up the governmental activities of the Panama Canal administration. Tolls will be calculated in accordance with a formula written into the law which will result in the operation of the Canal on a self-sustaining basis. Interest will be charged at a going rate which is approximately 2.3 per cent at the present time on the capital investment in the Panama Canal and this interest must be paid into the Treasury of the United States. In addition to paying for the cost of operating and maintaining the Canal, it is estimated that about 50 per cent of the cost of the civil government would be supported by the tolls collected from transit vessels. The remainder of the cost of the civil government would be borne by the other business activities, such as hotels, commissaries, etc. As a result, the Canal will be on a self-sustaining basis and the other collateral businesses operating in the Canal Zone must bear their proportionate share of the cost of the civil government, health, and sanitation."

The Congress of the United States also left no doubt of its intention to sustain the words and spirit of the Hay-Pauncefote Treaty when, in the Act of 1950, it incorporated the treaty by reference into Section 412(d), Tit. 2 of the Canal Zone Code.

Despite the Act of 1950, it would appear from the opinion of the United States Court of Appeals in this case (*Grace Line, et al.* v. *Panama Canal Company*, 243 F. 2d 844) that there is good reason to believe that the tolls are not compatible with the formula for determining tolls so clearly expressed by both the British and American Governments. For instance, the Court said, p. 852: "That the defendant would defer toll changes in order to apply canal profits to cover its losses in other enterprises never occurred to the legislators." Moreover, the United States District Court (*Grace Line, et al.* v. *Panama Canal Company*, 143 F. Supp. 539, 546) seems to suggest bases, i.e., national transportation policy and foreign policy, for determining tolls not contemplated in the Clayton-Bulwer and Hay-Pauncefote Treaties and contrary to both their letter and spirit.

This apparent departure, in existing practice and in the opinion of the United States District Court, from the traditional formula stated by Sir Edward Grey and by the Act of 1950, if not rectified by this Honorable Court, could have considerable repercussions among all nations using the Canal.

The opinion of the United States Court of Appeals in this case is greatly reassuring to the United Kingdom, as a signatory to the Hay-Pauncefote Treaty, in its reaffirmation of historical and present American obligations; when it refers to that Treaty, p. 856: " . . . which here binds the government to conduct its venture in a fashion that will provide fair and equitable tolls for users of all lands". Moreover, the opinion of that Court repels a potential threat to the traditional Anglo-American formula for determining tolls when it says, p. 854:

> " . . . the Hay-Pauncefote Treaty forbids use of the canal toll rate as a weapon of foreign policy."

CONCLUSION

This Court should sustain the principle of "just and equitable" tolls under Article III, Section 1, of the Hay-Pauncefote Treaty and the formula for determining those tolls as stated by Sir Edward Grey and similarly by Section 412(b) of the Canal Zone Code.

Dated, New York, N. Y.,
March 18th, 1958.

Respectfully submitted,

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Office Supreme Court, U.S.
FILED
JUL 6 1957
JOHN T. FEY, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. [redacted] 252

GRACE LINE, INC., ISBRANDTSEN COMPANY, INC., LUCKENBACH STEAMSHIP COMPANY, INC., MATSON NAVIGATION COMPANY, MOORE-McCORMACK LINES, INC., ORE NAVIGATION CORPORATION, CALMAR STEAMSHIP CORPORATION, POPE AND TALBOT, INC., STATES MARINE CORPORATION OF DELAWARE, UNITED FRUIT COMPANY, UNITED STATES LINES COMPANY, WEYERHAEUSER STEAMSHIP COMPANY, *et al.*,

Petitioners,

against

PANAMA CANAL COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

GRACE LINE, INC., ISBRANDTSEN COMPANY, INC., LUCKENBACH STEAMSHIP COMPANY, INC., MATSON NAVIGATION COMPANY, MOORE-McCORMACK LINES, INC., ORE NAVIGATION CORPORATION, CALMAR STEAMSHIP CORPORATION, POPE AND TALBOT, INC., STATES MARINE CORPORATION OF DELAWARE, UNITED FRUIT COMPANY, UNITED STATES LINES COMPANY, and WEYERHAEUSER STEAMSHIP COMPANY, NATIONAL BULK CARRIERS, INC., AMERICAN-HAWAIIAN STEAMSHIP COMPANY, ORE TRANSPORT, INC., AMERICAN TANKERS CORPORATION OF DELAWARE, ATLANTIC CARGO CARRIERS CORPORATION, COLONIAL STEAMSHIP CORPORATION, CORAL STEAMSHIP CORPORATION, GREENWAVE STEAMSHIP CORPORATION, INSULAR STEAMSHIP CORPORATION, JUPITER STEAMSHIP CORPORATION, MERCHANTS STEAMSHIP CORPORATION, NORTHEASTERN STEAMSHIP CORPORATION, NORTH SEAS NAVIGATION CORPORATION, OCEANIC WATERWAYS CORPORATION, ORION SHIPPING & TRADING CO., INC., PANOCEANIC STEAMSHIP CORPORATION, PHOENIX STEAMSHIP CORPORATION, SEAFARER STEAMSHIP CORPORATION, SEAFORTH STEAMSHIP CORPORATION, SEATRANSPORT CORPORATION, SEVEN SEAS STEAMSHIP CORPORATION, SOUTHATLANTIC NAVIGATION CORPORATION, SOUTHERN CARGO CARRIERS CORPORATION, STATES CARGO CARRIERS CORPORATION, STONE STEAMSHIP COMPANY, INC., THREE OCEANS STEAMSHIP CORPORATION, UNIVERSAL CARGO CARRIER CORPORATION, YARMOUTH STEAMSHIP CORPORATION and INDEPENDENT TANKSHIPS, INC.,

Petitioners,

against

PANAMA CANAL COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorables, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners above named respectfully submit their petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit in this case in so far as it dismisses their claim for damages for failure to prescribe tolls in accordance with Section 412(b) of Title 2 of the Canal Zone Code.

Opinions Below

The opinion of the District Court (165a-187a) is reported at 145 F. Supp. 539.

The opinion of the Court of Appeals (Appx. A, 1-24) has not yet been reported.

(References to appendices to this brief are cited "Appx. A" etc.; references to the appendix to petitioners' brief in the Court of Appeals are cited "165a" etc.)

Jurisdiction of This Court

The decree of the Court of Appeals sought to be reviewed was entered on April 8, 1957 (Appx. A, 1).

The jurisdiction of this Court is invoked pursuant to Title 28, Sections 1254(1) and 2101, of the United State Code.

Questions Presented for Review

The opinion of the Court below and the petition of the Panama Canal Company, hereinafter referred to as "defendant," state the circumstances generally.

Basically, the case revolves around the defendant's unlawful and unreasonable application of the surplus revenues of Canal operation to the losses of its non-Canal ventures, rather than to reduced tolls as required by law.

Defendant was required by Sections 411 and 412, Title 2 of the Canal Zone Code, as enacted by the Act of September 26, 1950, to fix tolls according to a formula stated therein; in substance the formula provided that tolls should reflect the costs of Canal operation. Section 14 of the Act of 1950 provided that the formula should be effective upon a date that proved to be July 1, 1951. For many years defendant has failed to apply the statute, meanwhile collecting tolls greatly in excess of costs as defined by the statute, and concealing its action by "ambiguous bookkeeping," as the Court of Appeals put it. The General Accounting Office audit report for 1954 fixed the amount of the excess from July 1, 1951—June 30, 1954 as $27,836,504, about $25,000 a day, *infra*, p. 9.

Petitioner shipping companies, hereinafter referred to as "plaintiffs", brought suit to compel defendant to prescribe tolls according to the statutory formula and to recover damages for its past failure to do so.

The Court sustained plaintiffs' suit to compel action with respect to the future but denied relief with respect to past damages.

The apparent basis for this decision was a proviso in Section 411 as follows:

> "Provided further, That * * * changes in rates of tolls shall be subject to, and shall take effect upon, the approval of the President of the United States, whose action in such matter shall be final and conclusive."

The Court below apparently construed this proviso to permit the President in his review of rates of tolls fixed by defendant to disregard the costs formula of Section 412. Thus the Court referred the President's action as a "veto" (Appx. A, 13, 22) and a "political decision" (Appx. A, 18).

From this premise the Court reasoned that it was impossible to calculate damages because "there is no way of knowing whether or not the President would have approved" tolls fixed by defendant (Appx. A, 23).

The Court also asserted that "we find no evidence of a congressional intent to allow recovery of overcharges" (Appx. A, 23).

Therefore the Court granted no relief with respect to such damages. That decision presents the following questions:

1. Was not the President's review power under Section 411 merely to see to it that any new rate prescribed by defendant complied with the Section 412 formula in accordance with the power and duty vested in him by Article II, Section 3, of the Constitution that he "take Care that the Laws be faithfully executed", as distinguished from an authorization to the President to nullify Congressional tolls policy and to prescribe tolls that did not comply with law?

2. Construed as it has been by the Court below, is the proviso unconstitutional as a delegation of power and duty vested in Congress by Article I, Section 1, of the Constitution, granting Congress "all legislative Powers," and by Article IV, Section 3, granting Congress power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States", *United States* v. *Grimaud*, 220 U. S. 506; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388?

3. Construing the Section 411 proviso as argued by plaintiffs, to mean that the President should see to it any new rate prescribed by defendant complied with the Section 412 formula, or, finding it unconstitutional and void, is there an adequate basis for the calculation of damages?

4. Did not Congress show its intention that defendant is liable for overcharges by (1) providing for the transfer of the Canal to defendant, a corporation fully subject to suit, (2) imposing upon defendant a duty to prescribe tolls according to a formula, (3) providing that that duty should be effective upon the transfer to defendant, and (4) imposing upon defendant the status of a public utility by incorporation of Article III, Section 1, of the Hay-Pauncefote Treaty in Section 412(d)?

(Defendant has maintained that, in respect of damages, the United States is a necessary party. The Court of Appeals did not rule on this point. Cf. Point VII, *infra*, pp. 33-34).

Statutes Involved

The case concerns the Constitution and many statutes. The primarily applicable excerpts from those chiefly at issue are quoted at Appendix C, *infra*, pp. 28-34. Here we list them with appropriate references:

Constitution: Article I, Section 1; Article II, Sections 1 and 3; and Article IV, Section 3 (Appx. C, 28).

Act of June 29, 1948: Section 2 (62 Stat. 1075-1077), enacting Sections 245, 247 and 253, Title 2, Canal Zone Code (Appx. C, 28-29).

Act of September 26, 1950: Sections 2, 10, 11, 12 and 14 (64 Stat. 1038-1043), of which Sections 10, 11 and 12 enact or amend Sections 256, 411 and 412, Title 2, Canal Zone Code (Appx. C, 29-32).

Administrative Procedure Act: Sections 2 and 10, 5 U. S. C. §§1001, 1009 (Appx. C, 32-33).

Title 28, United States Code (Judicial Code), §1331 (Appx. C, 33).

Treaty between United States and Great Britain concluded November 18, 1901 (Hay-Pauncefote Treaty): Article III, Section 1 (33 Stat. 1903) (Appx. C, 33).

Executive Order No. 10263 (16 F. R. 6333) (Appx. C, 34).

Because prior statutes regulating Canal tolls are not at issue here, but are relevant for background purposes, they are collected separately in Appendix D, 35-38.

Statement of Case

Defendant unlawfully and unreasonably withheld the prescription of reduced tolls, meanwhile applying the surplus revenues of its Canal operation to the losses of its other activities, and concealing its action by "ambiguous bookkeeping." The excess tolls charged from 1951 to 1954 were $27,836,504, or about $25,000 a day.

The statement of facts in this petition relates only to defendant's unlawful failure to reduce tolls and its unwarranted application of the surplus revenues of the Canal to its collateral activities. Defendant, as noted by the Court of Appeals, by "ambiguous bookkeeping concealed" this action (Appx. A, 14) until the publication of the General Accounting Office audit report for 1954 on May 13, 1955 (44a). This report, showing excess collections for the period July 1, 1951 to June 30, 1954 of $27,836,504 (35a), or $25,000 a day, was followed by the institution of this suit on September 13, 1955 (1a).

The tolls policy embodied in Section 412, Title 2, of the Canal Zone Code, became effective on the transfer of the Canal to defendant (Section 14, Act of September 26, 1950), an event that occurred on July 1, 1951 (16 F. R. 6333).

This policy called for fixing tolls on the basis of Canal operations and without regard to the losses or profits of defendant's activities that were "collateral" (the word is taken from the report of the Armed Services Committee to the Senate on the bill that became the Act of 1950; 141a).

In the language of the Court of Appeals (Appx. A, 13-14):

> "A certain latitude was allowed the defendant in deciding how frequently to change tolls, but this was limited by the requirement that in the long run tolls must reflect costs. . . . That the defendant would defer toll changes in order to apply canal profits to cover its losses in other enterprises never occurred to the legislators. . . . Until the GAO audit the defendant's ambiguous bookkeeping concealed the fact that the Treasury was being deprived of profits* made in operating the canal, so that consumers of goods and services furnished by the other ventures could enjoy them below cost—the very type of subsidy the Government Corporation Control Act and the 1950 amendments to the Panama Canal Act were designed to prevent. The men who spent three years hammering out a compromise toll formula for future operation of the canal did not mean to give the defendant's board of directors *carte blanche* to ignore the statutory mandate whenever defendant's other business ventures were losing money."

A like analysis had already been made by the General Accounting Office. In its audit report for 1954 it said in part (46a):

> "We interpret the legislation as precluding any losses sustained by the Panama Canal Company in the operation and maintenance of business facilities being included in the basis for determining tolls

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*Plaintiffs maintain that under Section 412(b) the excess revenues should be applied to reduced tolls, and not remitted to the U. S. Treasury. The context of its opinion indicates that the Court of Appeals has the same view. Plaintiffs do not understand this allusion to the Treasury.

> under Section 412(b). Based on the financial results of the Canal activity for the past three years, toll rates would have to be reduced substantially if hearings were held at this time."

The GAO calculation of the excess collections at $27,836,504 for the three years 1951-1954 appears on the opposite page (35a). [The 1955 audit report, published while this case was pending in the Court of Appeals, showed at p. 20 excess collections to June 30, 1955 of $35,143,000].

The table opposite shows that the absorption of the business losses has been accomplished by charging to tolls the Company's entire interest, Canal Zone Government and administrative expense, contrary to law.

The effect of defendant's failure to comply with the law has been to deprive plaintiffs and their class of the benefit of the increased use of the Canal (Appx. A, 7). The corresponding increase at Suez has resulted in toll reductions there aggregating 40% since World War II.

THE COURT OF APPEALS AND THE GENERAL ACCOUNTING OFFICE HAVE CORRECTLY CONSTRUED THE ACT OF SEPTEMBER 26, 1950 AS REQUIRING THAT TOLLS BE BASED ON CANAL OPERATIONS, AND WITHOUT REGARD TO THE COLLATERAL ENTERPRISES.

The argument on this point will be extremely condensed.

Section 412(b) as enacted by Section 12 of the Act of 1950 (Appx. C, 31-32) provides that tolls shall be prescribed to cover the costs of "operating the Panama Canal, together with the facilities and appurtenances related thereto."

The context of the statute, the legislative history and other circumstances demonstrate decisively that the expression "facilities and appurtenances related thereto" does *not* include the collateral activities.

	Three years ended June 30, 1954		
	Canal activity	Business activities	Total
Revenue	$112,861,870	$141,958,379	$254,820,249
Operating expenses, including adjustments in 1954 to prior years' retained income	44,436,726	129,556,812	173,993,538
Operating income	68,425,144	12,401,567	80,826,711
General corporate expense (allocated by General Accounting Office):			
Net cost of Canal Zone Government (note a)	19,153,898	12,140,136	31,294,034
Interest payable to U. S. Treasury (note b)	18,518,673	5,439,180	23,957,853
Administrative and other general expenses (note c)	2,916,069	9,630,222	12,546,291
	40,588,640	27,209,538	67,798,178
Net income (—loss)	$ 27,836,504*	—$ 14,807,971	$ 13,028,533†

"(a) Net costs of Canal Zone Government are allocated on the revenue ratio defined in section 412(b) of the Canal Zone Code. This results in an allocation of 65 percent of these costs to the canal activity for 1954, 63 percent for 1953, and 55 percent for 1952. * * *

"(b) Interest for the fiscal years 1952, 1953, and 1954 is computed at 1.95, 2.05, and 2.342 percent, respectively, on $377,764,946, the net direct investment of the Government in the Company. * * *

About 78 percent of this is invested in facilities of the canal activity and the remaining 22 percent in facilities of all other activities. This relationship has been approximately the same for the past 3 years.

"(c) Most of the administrative and other general expenses were allocated on a direction-of-effort basis; the remainder was charged directly to the applicable activity. The direction-of-effort basis was used by the Company in 1953 for statistical purposes and seems reasonable. It results in an allocation of approximately 25 percent to the canal activity."

* The amount of $25,000 a day as the overcharge (p. 6) is reached by dividing $27,836,504 by 1,096, the number of days involved. The amount of $4,000 a day as the original plaintiffs' share of the excess is based upon the ratio of tolls paid by plaintiffs (10a) to aggregate tolls. Because of the use of the Canal by Government ships, the figure of $25,000 a day slightly overstates the daily overcharge paid by private shipping industry during the Korean war period, but because government use has decreased and private use increased, probably understates the present daily overcharge.

† In November, 1954 the Company paid "as dividends" $10,000,000 to the U. S. Treasury under Section 253, Title 2, Canal Zone Code (48ab).

Section 10 of the Act of 1950, enacting Section 256, Title 2, of the Code (Appx. C, 29-30) authorized the President to transfer to defendant:

> "* * * the Panama Canal, together with the facilities and appurtenances related thereto, *and* any or all of the facilities and appurtenances heretofore maintained and operated by the Panama Canal under authority of section 51 of title 2 of the Canal Zone Code."

Thus Section 10 drew a distinction between "the facilities and appurtenances *related*" to the Panama Canal, and "the facilities and appurtenances heretofore maintained and operated" under Section 51, etc.

A third category of defendant's activities were those already in its possession by virtue of the Act of 1948 by which it had been created.

When the President on June 29, 1951 issued his Executive Order No. 10263 (Appx. C, 34), he transferred to defendant:

> "(a) the Panama Canal (the waterway), together with all the facilities, buildings, structures, and improvements related thereto, *and* (b) ~~all other facilities, buildings, structures, and improvements related thereto, and (c)~~ all other facilities, buildings, structures and improvements whatsoever now maintained and operated by The Panama Canal. * * *"

Thus again the distinction was drawn between the facilities and appurtenances related to the Canal and other facilities, etc.

As indicated in the hearings and reports cited in the footnotes of the Court of Appeals opinion, the legislative history is categorical that defendant's respective activities were to be self-sufficient and that the general expenses were

to be allocated among them. For instance, the Bureau of the Budget study which led to the Act of 1950, said that:

> "Sales and services [of the collateral business activities] to all others, including Government agencies, should be at prices over cost which may reasonably be expected to cover, in the aggregate, the interest on the Government's investment and the Company's share of the expense of civil government and related activities * * *" (62a).

Again, the Bureau study maintained that the "expense of civil government would be assessed against the total enterprise, rather than exclusively against tolls * * *" (62a).

At the Senate hearing the Bureau representative explained that "any business has to carry its share of the interest, too, in proportion to its investment" (97a).

The Committee staff member at that hearing asserted that under the bill the "various businesses like commissaries, *et cetera* * * * will have to be self-sustaining and contribute their share toward the over-all operating costs of the Canal" (97a).

Both House and Senate Committee reports adopted the same theory (Appx. E, 39-41; 140a-143a), as did defendant's budget program for 1952, prepared at the time of the enactment of the Act of 1950. President's Budget for fiscal 1952, pp. 572-575.

In the interest of brevity we do not further develop this point herein.

DEFENDANT KNEW THAT IT WAS ITS DUTY TO PRESCRIBE TOLLS ON THE BASIS OF CANAL OPERATIONS AND NOT TO USE TOLLS TO ABSORB THE LOSSES OF ITS COLLATERAL ACTIVITIES, AND DEFENDANT WAS FREQUENTLY SO WARNED.

Although plaintiffs do not regard it as incumbent upon them to do more than show that defendant acted unreasonably and unlawfully under a proper construction of the statute, there is evidence that defendant was quite conscious of the true meaning of the law but wilfully chose to disobey it. Plaintiffs' efforts to develop this evidence by discovery procedures auxiliary to their motion for summary judgment were stayed by the District Judge pending his consideration of the defendant's motion to dismiss the complaint (163a-164a). The record and official publications do, however, show the following:

Its 1952 budget program, prepared at the time of the enactment of the 1950 legislation, defendant set up a separate budget for the Canal, and, finding tolls insufficient according to its estimates, stated its intention to increase tolls. The budgets for the collateral or "business activities" were also separate, and showed these activities bearing their share of general and administrative expense. President's Budget for fiscal 1952, pp. 572-575.

So as to be concise we shall not here trace in detail the extraordinary and "ambiguous bookkeeping" by which defendant in its subsequent budget programs and annual reports "concealed" the financial results (28a-33a); 1953 Budget, pp. 725-727; 1954 Budget, pp. 684-685; 1955 Budget, pp. 631-637; 1956 Budget, pp. 647-649.

According to GAO, in December, 1953 defendant's General Counsel found unlawful its policy of pricing the

goods and services of the "business activities", that is, the policy by which the business activities, by not carrying their share of general expense, charged their losses to tolls (48a). This opinion was withheld from the Board of Directors (48a), GAO implies.

Plaintiffs believe this opinion to be of special significance as it necessarily found preliminarily that the law required that the separate activities be self-sufficient. Defendant had waived its privilege, if any, with respect to this opinion. *Himmelfarb* v. *United States*, 175 F. 2d 924, 938-939 (C. A. 9th). Plaintiffs' efforts to get a copy were, however, stopped by the District Judge's stay. Plaintiffs are at a loss to conceive how defendant's President, an Army officer, could justifiably overrule its General Counsel, a career civil servant learned in Canal Zone law and the codifier of the Canal Zone Code.

Defendant's 1954 report referred to bills pending in Congress to amend Section 412 (b) "so as to redistribute the corporate burden internally in order to shift a relatively large portion of the burden on tolls activity, and correspondingly, to decrease the portion of overall obligations which is to be borne by other activities of the Company" (147a)—a remark which showed that defendant was aware how Section 412 then did, as it now does, distribute the "overall obligations" because, as noted, it is by charging its general expense against tolls that defendant has used tolls to absorb the losses of its other ventures.

In November 1954 defendant declared a dividend of $10,000,000 under Section 253, Title 2, Canal Zone Code (48a). Section 253 authorizes the payment of excess working capital as dividends, a measure applicable only to the profits of the collateral activities in view of the command of Section 412 that tolls be related to costs (48a).

On May 13, 1955 the GAO audit report for 1954 was published. This report has been referred to and quoted *supra* pp. 6-9.

DEFENDANT AVOIDS THE ISSUE IN THIS SUIT.

After this suit had been brought on September 13, 1955, plaintiffs moved for summary judgment on October 26, 1955 (11a). The moving affidavit of plaintiffs' counsel emphasized that the tolls formula was independent of the "business operations" (16a-18a; 25a-39a).

Nevertheless the affidavit of defendant's counsel, supporting its motion to dismiss, studiously avoided that issue, although discussing the subject of tolls at length (150a-161a). So did defendant's brief in the District Court.

The District Judge dismissed the complaint, but he "assumed for purposes of this motion that tolls prescribed pursuant to Section 412 would be lower than those now prevailing" (170a).

In the Court of Appeals defendant's brief again failed to argue that the statute authorized the use of tolls to absorb the losses of collateral activities, although in other respects freely discussing tolls policy.

The Court of Appeals announced its decision on April 8, 1957 (Appx. A, 1). That Court expressly held that the law did not permit defendant to take into account the losses of the business activities in prescribing tolls (Appx. A, 13-14).

Thereafter, on May 1, 1957, the Court of Appeals denied a stay (Appx. B, 26).

Then defendant applied to Mr. Justice Harlan for a stay. Defendant apparently sought to convey the impression that the major substantive question was a dispute

between defendant and GAO over accounting techniques.* However on the representation by the Assistant Attorney General that our country's foreign relations might be adversely affected, Mr. Justice Harlan granted a stay (Appx. B, 27).

The Jurisdiction of the Court of First Instance

The jurisdiction of the United States District Court for the Southern District of New York was invoked under the authority of Title 28, U. S. Code (Judicial Code), Section 1331, as follows:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

The complaint employs the phraseology suggested by Form 2(b) in the Appendix to the Rules of Civil Procedure for suits brought under the authority of this statute.

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* Thus the application asserted (p. 2): "In the annual commercial-type audit reports of petitioner for the years of 1954 and 1955, submitted by the Comptroller General to Congress pursuant to Sections 105 and 106 of the Government Corporation Control Act (59 Stat. 599, 31 U. S. C. 850, 851), the Comptroller General took the position that petitioner had allocated to the Panama Canal too high a share of the cost of the Canal Zone Government and an inadequate amount to the various supporting activities of the Canal, such as the Panama Railroad, dock, harbor and repair facilities, and commissary stores for employees and ships."

The fact is that the Comptroller-General had complained in 1954 that petitioner had made no allocations at all (1954 Report, 45a; cf. Appx. A, 28), and in 1955, that the petitioner had refused to make its allocations available to him (1955 Report, pp. 18-19). It was for this reason that the General Accounting Office made its own allocations as shown by the table quoted *supra*, p. 9.

ARGUMENT

Outline of Argument.

POINT I. As this case shows, failure to provide relief for the excessive tolls collected in the past rewards concealment and obstruction, frustrates the Congressional intent and gives an appearance of hypocrisy to professions by the United States that it favors the rule of law for international waterways.

POINT II. The review power of the President under Section 411 is supervisory and administrative in accordance with his constitutional duty to "take Care that the Laws be faithfully executed". The Court below erred, plaintiffs submit, in construing Section 411 as a delegation of legislative power authorizing the President to disregard the tolls policy embodied in Section 412.

POINT III. Construed to mean that the President may set tolls that do not comply with Section 412, the Section 411 proviso is unconstitutional and void.

POINT IV. Construing the Section 411 proviso to mean that the Section 412 formula must be complied with and not that it may be nullified, or disregarding the proviso as void, there is adequate basis for assessing damages: *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555.

POINT V. Congress showed its intent that defendant make reparation for overcharges by, (1) providing for the transfer of the Canal to defendant, a corporation fully subject to suit, (2) imposing upon defendant a duty to prescribe tolls according to a formula, (3) providing that that duty should be effective upon the transfer, and (4) imposing upon defendant the status of a public utility by incorporation of Article III, Section 1 of the Hay-

Pauncefote Treaty in the laws of the United States. These statutes create legal relationships under which well-settled principles accord a right to damages when the duty is breached, although a toll prescribed by defendant is not finally effective *per se;* specific provision for damages is unnecessary.

POINT VI. The theory that the President's review power under Section 411 was for better compliance with Section 412 and not for its nullification is in no way inconsistent with judicial relief.

POINT VII. The United States is not an indispensable party.

POINT I

As this case shows, failure to provide relief for the excessive tolls collected in the past rewards concealment and obstruction, frustrates the Congressional intent and gives an appearance of hypocrisy to professions by the United States that it favors the rule of law for international waterways.

Here the courts have adjudicated that defendant acted unlawfully in its obstinate refusal to fix tolls on the basis of Canal operations; moreover, defendant apparently realized that such was its legal duty and received frequent warnings from others to the same effect, *supra* pp. 12-14, and defendant long aided its unlawful refusal by concealment effected by "ambiguous bookkeeping" (Appx. A, 14).

Under these circumstances the Court of Appeals denied a stay pending petition for certiorari. That Court believed that "in view of the heavy accumulating loss to plaintiffs . . . a stay of the mandate to prevent even a beginning

in the lengthy steps necessary towards compliance with this court's order is not in the interest of justice" (Appx. B, 26).

On the other hand Mr. Justice Harlan thought "the particular interim interests of these steamship companies must yield to the broader concerns involved [i.e., our country's foreign relations] in having this litigation proceed to an orderly final conclusion" and granted the stay (Appx. B, 27).

Some six years have now passed since the new tolls policy became "effective" according to the Congressional declaration (Section 14, Act of September 26, 1950; Appx. C, 32). At least six months must pass after this Court's decision before a new rate can go into effect. At the stay hearing before Justice Harlan the Assistant Attorney General spoke of "contempt proceedings" after the entry of a decree for plaintiffs, indicating that still further litigation will be necessary to secure compliance.

If there is to be no liability for past damages, then through the delay seemingly inherent in this type of litigation and its long hidden, persistent disobedience, defendant is the gainer to the extent of tens of millions of dollars and the Congressional intent that the formula take effect July 1, 1951 is frustrated.

Defendant's counsel successfully argued foreign relations before Justice Harlan.

Our highest officials have in the last year urged forcefully and well that international waterways be governed by the rule of law and not by arbitrary executive power. Unfortunately foreign nations are not likely to give full weight to these fine pronouncements if our country permits an executive department of our own to retain vast sums judicially declared to have been unlawfully levied upon the commerce of the world for many years.

POINT II

The review power of the President under Section 411 is supervisory and administrative in accordance with his constitutional duty to "take Care that the Laws be faithfully executed". The Court below erred, plaintiffs submit, in construing Section 411 as a delegation of legislative power authorizing the President to disregard the tolls policy embodied in Section 412.

As shown *supra* pp. 3-4, the Court below ruled against the claim for damages on the theory that the review power of the President under Section 411 permitted him to disregard the tolls policy embodied in Section 412. Plaintiffs submit that this ruling was erroneous.

A. Prior legislation and the immediate background show that Congress intended by the Act of September 26, 1950 to establish tolls policy, not to abdicate it.

Congress has at all times regulated tolls policy, although permitting the executive branch a limited discretion within the framework of that policy. The successive statutes are the Act of August 24, 1912 (37 Stat. 560, 562-3), the Act of June 15, 1914 (38 Stat. 385-6), the Act of June 19, 1934 (48 Stat. 1122) and the Act of August 24, 1937 (50 Stat. 750); they are collected in Appendix D to this brief, *infra* pp. 35-38.

As pointed out by the Court of Appeals at footnote 13 (Appx. A, 9) President Franklin D. Roosevelt, having difficulty in the construction in of the statute, sought and obtained clarifying legislation—the Act of August 24, 1937.

And in 1913 President Wilson, disagreeing with the policy of the Act of 1912 in so far as applicable to intercoastal shipping, sought and obtained legislative amend-

ment—the Act of June 15, 1914. 4 Baker, *Woodrow Wilson*, pp. 421-2.

That Congress should abandon this historic control is not to be lightly presumed. The legislative history of the Act of 1950 shows the direct contrary—that Congress intended thereby to establish policy, not to abandon its control of policy.

The minutes of the hearing of the subcommittee of the Senate Committee on Armed Services and the report of that Committee are in the record (Hearing, 69a-139a; Report, 140a-143a). Almost the entire Armed Services report is devoted to an exposition of that formula, treating it as the major accomplishment of the legislation. At the hearing before the House Merchant Marine Committee substantially the same witnesses appeared and said the same things: excerpts from the report of that Committee are attached hereto as Appendix E. The minutes and report show primary attention to the tolls formula.

By way of contrast the President's review power, was, as put by the Court of Appeals, "hardly discussed during the legislative history of the Act" (Appx. A, 13). That power was not even mentioned in the Armed Services report. It is not conceivable that Congress could have intended in such offhand fashion to authorize the President, contrary to the tradition of Panama Canal tolls-fixing, to set aside the formula to the development of which Congress had devoted so much care.

B. In view of the President's character as the repository of the "executive power" (Article IV, Section 1) and his duty to "take Care that the Laws be faithfully executed" (Article IV, Section 3), the natural and suitable construction of the proviso is that the President should see to it that the Panama Canal toll rate complies with law.

To construe the proviso to delegate legislative power without the guidance of any standard is, plaintiffs submit, artificial and unreasonable.

The primary function of the President is administration and not legislation. As this Court said in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 587: "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."

The administration of the Government is so gigantic and complex that the President obviously cannot be expected to oversee, much less to perform, every operation, as this Court said more than a century ago in *Williams* v. *United States*, 1 How. 290, 297.

The evident purpose of the Section 411 proviso was to make sure that the matter of setting Panama Canal tolls did receive the personal attention of the President.

To be practical, let us recall that the proviso was originally proposed by a report of the Bureau of the Budget (66a), a body that has come to audit and correlate the performance of their functions by the executive departments. The proviso meant that before the rate went into effect the Bureau of the Budget would have a look at it.

It is undoubtedly true that Congress has from time to time authorized the President and other public officers and bodies to make rules or findings legislative in nature. These authorizations were elaborately discussed by this Court in *Panama Refining Co.* v. *Ryan*, 293 U. S. 388. That discussion makes abundantly clear that such authorizations are, as Chief Justice Marshall expressed it in *Wayman* v. *Southard*, 10 Wheat. 1, 43, "to fill up the details" of policies and standards laid down by Congress. 293 U. S. 426. In

other words the authorization is for the better enforcement of Congressional policy, not for its nullification.

In the *Panama Refining* case the Court referred at length to *United States* v. *Grimaud*, 220 U. S. 506, a leading case that, like this, relates to Government property and the exercise of Congressional power under Article IV, Section 2, of the Constitution as well as under Article I. Relying on that case the Court emphasized that Congress might confer power, not to make laws, but "for administering the laws which did govern * * * valid only as subordinate rules and when found to be within the framework of the policy which the legislature has sufficiently defined * * * (Congress) was merely conferring administrative functions upon an agent, and not delegating to him legislative power". 293 U. S. 428-429.

The principle that rate-making is a legislative process, *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, is not inconsistent with this analysis of the power of the President under Section 411. In the exercise of its rate-making power Congress customarily lays down "an intelligible principle to which the person or body authorized to fix such rates is directed to conform." *Hampton & Co.* v. *United States*, 276 U. S. 394, 409. The language used by this Court to describe the President's rate-making powers under the Act of October 1, 1890 was, in *Field* v. *Clark*, 143 U. S. 649, 693, "What the President was required to do was simply in execution of the Act of Congress"—language repeated in *Hampton* at pp. 410-411 and in *Panama Refining* at p. 430.

POINT III

Construed to mean that the President may set tolls that do not comply with Section 412, the Section 411 proviso is unconstitutional and void.

Article I, Section 1, of the Constitution entrusts to Congress "all legislative Powers". Article IV, Section 3 grants to Congress the power "to make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States".

In *Panama Refining Co.* v. *Ryan* this Court held unconstitutional Section 9 (c) of the National Industrial Recovery Act, 48 Stat. 195, 200, by which the President was authorized to prohibit the interstate transportation of oil produced in excess of state permission. The Court said at 293 U. S. 388, 430. "... the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited."

In referring to the President's action as a "veto" and a "political decision", and in saying "there is no way of knowing whether or not the President would have approved tolls fixed by defendant" (Appx. A, 13. 18, 23) the Court of Appeals apparently construed the Section 411 proviso to be as unlimited a grant as that in Section 9(c) of NIRA. So construed the grant would be, like that of Section 9(c), unconstitutional and void.

Although it is true that *Panama Refining* dealt with "legislative Powers" under Article I, Section 1, the principle of that case is equally applicable to property powers under Article IV, Section 3 under which Congress was per-

haps acting in adopting Section 412. In *Panama Refining* this Court cited cases arising under these sections interchangeably.

POINT IV

Construing the Section 411 proviso to mean that the Section 412 formula must be complied with and not that it may be nullified, or disregarding the proviso as void, there is adequate basis for assessing damages. *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555.

The difficulty found by the Court in determining damages was that "there is no way of knowing whether or not the President would have approved" tolls fixed by defendant (Appx. A, 23). But when that approval is contrued to mean executive supervision of defendant's performance of its duty under Section 412, that difficulty disappears, or, at least is brought within permissible limits in the calculation of damages.

The toll rate necessary to pay the cost of Canal operation can be readily ascertained—in fact, has been ascertained by the General Accounting Office. Defendant's stay application intimated that it disputes some of GAO's determinations. What defendant disputes plaintiffs do not know because defendant has never made public its own statement of results by activities. Plaintiffs cannot conceive any issue in the calculation of damages which could not be solved by a Special Master in accordance with accepted legal principles.

If it be established that defendant has wronged plaintiffs, as the Court of Appeals has held, damages can be awarded on the basis of proof from which a reasonable inference can be drawn, despite the absence of proof permitting a precise computation.

The only impediment here is that the statute contemplated that tolls be fixed prospectively, while a court would determine damages retrospectively. Although this impediment is perhaps a difficulty in calculating what figure would have been reached if defendant had complied with Section 412, it will in fact permit a more accurate effectuation of the Congressional tolls policy.

Certainly the situation is well within the rule laid down by this Court in *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 563:

> "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise."

This rule has been followed in cases requiring far more speculation than is necessary here. *Cf. Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251.

It is to be observed that any difficulty in determining damages here is that always encountered in suits against public utilities for excess charges. A public utility has the right to exercise its own judgment as to what is lawful and reasonable and prospectively fix a rate accordingly. Once it is ascertained that the utility has not so

acted, then the court, acting retrospectively, will fix a lawful and reasonable rate and give judgment for the excess. Cf. cases cited *infra*, pp. 28-30.

POINT V

Congress showed its intent that defendant make reparation for overcharges by, (1) providing for the transfer of the Canal to defendant, a corporation fully subject to suit, (2) imposing upon defendant a duty to prescribe tolls according to a formula, (3) providing that that duty should be effective upon the transfer, and (4) imposing upon defendant the status of a public utility by incorporation of Article III, Section 1 of the Hay-Pauncefote Treaty in the laws of the United States. These statutes create legal relationships under which well-settled principles accord a right to damages when the duty is breached, although a toll prescribed by defendant is not finally effective *per se*; specific provision for damages is unnecessary.

The Court below dismissed the claim for damages upon the further ground that "we find no evidence of a congressional intent to allow recovery of overcharges" (Appx. A, 23). Plaintiffs submit that Congress by creating between shipowners and defendant legal relationships under which well-settled principles accord a right of damages when duty is breached showed an intent to allow such recovery.

That public corporations subject to suit have all the liabilities of private corporations, except as to execution, has been settled by numerous decisions of this Court. *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381; *F. H. A.* v. *Burr*, 309 U. S. 242; *R. F. C.* v. *Menihan Corp.*, 312 U. S. 81.

With respect to defendant, we know not only that Congress presumably had in mind the general principles applicable to public corporations as laid down by this Court, but also that the 81st Congress, which enacted the Act of September 26, 1950, specifically intended that defendant "should be subject to suit on *all* claims, tort as well as contract, in the *same* manner as *any* private corporation". The quotation is from the House Judiciary Report on Public Law 172, 81st Congress 1st Sess. (House Report No. 830, U. S. Code Cong. Serv. p. 1591). Public Law 172, approved July 16, 1949, took defendant out of the Federal Tort Claims Act for the purpose stated. A repercussion of Public Law 172 was before this Court in *Gardner* v. *Panama R. Co.*, 342 U. S. 29.

About a year later the 81st Congress enacted the Act of September 26, 1950. By that Act Congress authorized the transfer of the Canal to defendant, an "agency" of the United States which was subject to suit like "any private corporation," imposed upon defendant the duty to prescribe tolls according to a formula and made that duty "effective" upon the transfer, an event that occurred July 1, 1951 (16 F. R. 6333). (Sections 10, 11, 12 and 14 of the Act, Appx. C, 29-32).

Further, Congress by Section 12 of that Act enacting Section 412(d), incorporated in the laws of the United States the tolls provision of the Hay-Pauncefote Treaty, Article III, Section 1, 33 Stat. 1903, as follows:

> "The United States adopts, as the basis of the neutralization of such ship canal, the following Rules, substantially as embodied in the Convention of Constantinople, signed the 28th October 1888, for the free navigation of the Suez Canal, that is to say:
>
> "1. The Canal shall be free and open to the vessels of commerce and of war of all nations observ-

> ing these Rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable" ["just and equitable charges" is taken from the French legal expression, "*justes et equitables charges*," meaning "reasonable rates"].

The obligation to serve all customers without discrimination and at reasonable rates is the classic characteristic of the public utility in Anglo-American law. *Munn* v. *Illinois*, 94 U. S. 113.

By these provisions Congress showed its intention that this country's duty under the Hay-Pauncefote Treaty in respect of tolls, whatever it might continue to be as a matter of international negotiation or litigation, was now enforceable as a matter of municipal law in the courts of the United States, and defined reasonable rates as the Section 412 formula.

And as a matter of municipal law that duty is enforceable, under well-settled principles of law, not only with respect to future rates, as held by the Court of Appeals, but also as to past damages, irrespective of express statutory provision.

Defendant's liability as a corporation with public utility obligations: When a public utility fails to perform its duty to fix a lawful and reasonable rate, the user may recover in the courts whatever excess has been charged. *Arizona Grocery Co.* v. *Atchison Ry. Co.*, 284 U. S. 370, 383; *Salt River Canal Co.* v. *Nielsen*, 10 Ariz. 9; *City of Chicago* v. *Northwestern Co.*, 218 Ill. 40 (municipal water system); *Winchester Turnpike Co.* v. *Croxton*, 98 Ky. 739; *Heiserman* v. *Burlington, C. R. & U. Co.*, 63 Iowa, 732;

Louisville etc. Ry. Co. v. *Wilson*, 132 Ind. 517, 526. The language of this Court in the *Arizona Grocery* case was as follows at 284 U. S. 383:

> "The exaction of unreasonable rates by a public carrier was forbidden by the common law. [Citation.] The public policy which underlay this rule could, however, be vindicated only in an action brought by him who paid the excessive charge, to recover damages thus sustained. Rates, fares, and charges were fixed by the carrier, which took its chances that in an action by the shipper these might be adjudged unreasonable and reparation be awarded."

And when, as in the *Winchester* and *Heiserman* cases, *supra*, the legislature defines what is reasonable, the user may recover any excess charged over the rate thus defined.

This principle continues to the present day despite the creation of regulatory commissions with authority to make reparations findings. Thus, under Section 16(2) of the Interstate Commerce Act, the Commission's reparation order merely is a condition precedent to, and evidence in, the user's suit for damages for the excess over the lawful rate. *Meeker* v. *Lehigh Valley R. Co.*, 236 U. S. 412, 430; *Lewis Co.* v. *Southern Pacific R. Co.*, 283 U. S. 654, 660-661. Only the courts definitively adjudge relief.

Defendant tries to hide behind the President—a somewhat presumptuous argument as defendant, acting unlawfully, deprived the President of an opportunity to function. In any event the argument does not have force. When the tariff rate is excessive, the failure of the carrier to file with the Interstate Commerce Commission a new and lawful rate calls for damages, although the Commission has a power to disapprove a rate so filed [Section 15(7)], and

although "as between shipper and carrier [the tariff rate] is the only legal rate." *L. & N. R. R.* v. *Sloss-Sheffield Co.*, 269 U. S. 217, 234; cf. *News Syndicate Co.* v. *New York Central R. Co.*, 275 U. S. 179, 187; *Lewis Co.* v. *Southern Pacific Co.*, *supra*.

Defendant's liability as a public officer or body: the citizen may recover damages suffered by reason of the failure of a public officer or body to perform its statutory duty. *Amy* v. *Supervisors*, 11 Wall. 136. Most cases applying this doctrine relate to public officers who have full control of the administrative process in question. At least one case, however, relates to a public officer who did not have final power, but, like the defendant here, had the duty of initial action, final action to be taken by another agency. *Hupe* v. *Sommer*, 88 Kan. 561, was a suit by a contractor against a city official who had wrongfully refused to certify to the county clerk that work under the contract had been satisfactorily completed. Under the statute the county clerk, upon receiving a certificate of completion, took final action in respect of payment. The Court said at pp. 564-565:

> "The petition also alleges that the defendant failed and refused to proceed as the law provides for the collection of the money and the payment of the plaintiff, and *failed and refused to put into operation the machinery provided by law* for the collection of taxes and moneys . . . If the defendant, without sufficient excuse, refused to perform [his duties], *he inflicted a wrong upon the plaintiff, and should be liable for whatever loss was thereby occasioned.*"

More particularly, a citizen entitled to mandatory relief against a public officer also receives damages caused by the delay in the performance of that duty. *Dow* v. *Humbert*,

91 U. S. 294, specifically approving *People* v. *Supervisors*, 28 N. Y. 112.

This Court has recognized that express provision for damages is not necessary.

The principle of the public utility rate and administrative law cases that breach of duty gives rise to an action for damages despite the absence of express statutory provision for damages has been recognized by this Court in similar cases.

In *Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U. S. 33, the Court considered a suit for damages suffered in an accident caused by defendant's failure to comply with the Safety Appliance Act. The Court said at p. 39:

> "A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the *damages* from the party in default is implied . . ."

In *Steele* v. *L. & N. R. Co.*, 323 U. S. 192, the Court considered a suit by several Negroes against a collective bargaining agent to forbid discrimination against them in the agent's negotiations with the employer. The agent had been chosen and functioned under the Railway Labor Act. The Court construed the Act to require the agent to act without discrimination. The Court then addressed itself to the contention that the Act made no provision for judicial relief, and said at p. 207:

> "That right (that the agent act without discrimination) would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation and which it is their duty

> to give in cases in which they have jurisdiction. . . . We conclude that the duty which the statute imposes on a union representative of a craft to represent the interests of all its members stands on no different footing and that the statute contemplates resort to the usual judicial remedies of *injunction and award of damages* when appropriate for breach of that duty."

The Court below relied on *Montana-Dakota Co.* v. *Public Service Co.*, 341 U. S. 246, a five-to-four decision of this Court. But in that case the plaintiff had brought suit under the Federal Power Act, a statute which granted a third party regulatory agency, the Federal Power Commission, the power to prescribe future rates, but consciously and deliberately withheld the power to grant reparations. A majority of the Court concluded that under these circumstances a complaint alleging excess rates in the past did not state a cause of action under the Federal Power Act. (It is to be noted, however, that even the Federal Power Act permitted damages back to the institution of rate proceedings.) The complaint also alleged that the rates were fraudulent, but the Court found no federal jurisdiction over that aspect of plaintiff's grievance. But here the case concerns a tort committed by the defendant of which the District Court, as a federal court, unquestionably had jurisdiction., 28 U. S. C. §1331, *supra* p. 15.

POINT VI

The theory that the President's review power under Section 411 was for better compliance with Section 412 and not for its nullification is in no way inconsistent with judicial relief.

As this is a subject on which the parties seem to agree, the argument can be cut short.

At page 30 of its brief in the Court of Appeals defendant said:

"The President's approval thus constitutes 'final agency action' (cf. Shaughnessy *v.* Pedreiro, 349 U. S. 48, 51)".

In *Shaughnessy* v. *Pedreiro* this Court held that the word "final" with reference to the action of an executive officer meant, in statutes enacted after the Administrative Procedure Act, final within the administrative procedure; rights of judicial review were not impaired. 349 U. S. 51.

There can be no doubt that this doctrine applies to the Act of September 26, 1950. No more need be said.

POINT VII

The United States is not an indispensable party.

The principal argument made by the defendant in the District Court was that plaintiffs had failed to join an indispensable party, *viz.*, the United States, and that the suit should be dismissed because it was an unconsented suit against the United States. But the United States, by creating the defendant corporation, accepting the role of stockholder in it, and by providing that defendant may be "sued

in its corporate name," gave its consent to be sued in so far as it had an interest in defendant's affairs.

Two decisions of the Court of Appeals of the Fifth Circuit held that defendant's predecessor, Panama Railroad Company (the New York Company), was subject to suit despite the fact that the Government was its sole stockholder and, at that time, had not expressly consented that it be sued. *Panama R. Co.* v. *Curran*, 256 Fed. 768, and *Panama R. Co.* v. *Minnix*, 282 Fed. 47.

The Court said in the *Curran* case, at p. 772:

> " . . . such legislation as that which has been mentioned shows that the lawmakers intended the relation between the government and the defendant to be that of a stockholder to the corporation which issued the stock, and not that of principal and agent. This being true, the following statements made in the opinion of Chief Justice Marshall in the case of Bank of the United States *v.* Planters' Bank, 9 Wheat. 904, 6 L. Ed. 244, are applicable to the facts of the instant case:
>
> "'. . . The state of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character.'"

As we have seen *supra*, p. 27, Congress, shortly before adopting the Act of September 26, 1950, took the defendant out of the Federal Tort Claims Act so as to restore to it its former status as "subject to suit on all claims, tort as well as contract, in the same manner as any private corporation."

WHEREFORE, petitioners respectfully pray that a writ of certiorari issue under the seal of this Court to review the judgment and decree herein of the United States Court

of Appeals for the Second Circuit in so far as said judgment and decree dismiss petitioners' claim for damages for excess tolls collected in the past, and that said judgment and decree to that extent be reversed.

July 2, 1957

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

No. 111—October Term, 1956.

(Argued November 13, 14, 1956. Decided April 8, 1957.)

Docket No. 24226.

GRACE LINE, INC., *et al.*,
Plaintiffs-Appellants,

and

NATIONAL BULK CARRIERS, INC., *et al.*,
Intervening Plaintiffs-Appellants,

v.

PANAMA CANAL COMPANY,
Defendant-Appellee.

Before:

CLARK, Chief Judge, and
FRANK[1] and HINCKS, Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, Lawrence E. Walsh, Judge.

Grace Line, Inc., and eleven other United States flag shipping lines, suing on behalf of all users of the Panama Canal, together with certain intervening plaintiffs, appeal

[1] Judge Frank heard arguments in this case, but died before this opinion was prepared.

from a dismissal, D. C. S. D. N. Y., 143 F. Supp. 539, for want of jurisdiction, of their complaint seeking to compel Panama Canal Company to prescribe tolls as required by recent congressional legislation and to recover damages for its past failure to do so. Reversed and remanded for a judgment for plaintiffs as stated.

C. Dickerman Williams, of Maclay, Morgan & Williams, New York City (J. Stewart Harrison, of Brobeck, Phleger & Harrison, San Francisco, Cal., and William J. Stoddard, of Maclay, Morgan & Williams, New York City, on the brief), for plaintiffs-appellants and intervening plaintiffs-appellants.

George Cochrane Doub, Asst. Atty. Gen., Washington, D. C. (Leavenworth Colby, Chief, Admiralty & Shipping Section, Dept. of Justice, Washington, D. C., Paul A. Sweeney and Herman Marcuse, Attys., Dept. of Justice, Washington, D. C., and Benjamin H. Berman, Atty. in Charge, Admiralty & Shipping Section, Dept. of Justice, New York City, on the brief), for Panama Canal Company, defendant-appellee.

Brief by James M. Estabrook, New York City, as *amicus curiae* in support of plaintiffs-appellants.

Clark, Chief Judge:

This appeal concerns the power of a federal district court to compel the government corporation which operates the Panama Canal to set tolls according to the new formula

established by Congress in 1950 and to repay canal users several million dollars damages for excess tolls charged. It raises interesting and important questions as to judicial responsibility and authority when administrative action is dilatory or lacking.

A class action by canal users seeking this relief ended in summary judgment for the defendant below, when Judge Walsh concluded that he lacked jurisdiction over the subject matter and over an indispensable party. In brief, he interpreted the 1950 statute[2] as giving the defendant discretion to defer use of the new formula and denying judicial review of the defendant's decision. The history of toll regulation in the canal illuminates the conflicting interpretations of the most recent statute.

From 1912 to 1948 two different government bureaus operated commercial enterprises in the Canal Zone. Under 1902 legislation the President owned all the stock of Panama Railroad Company, a corporate ancestor of the present defendant which ran a railroad, a shipping line, and miscellaneous ventures. After 1912 there also existed The Panama Canal, an unincorporated agency headed by a governor whom the President appointed. This agency administered the civil government of the Canal Zone and operated the canal itself.

The President had statutory authority to fix canal tolls at his discretion between 75 cents and a dollar per laden ton, and a formula was worked out by the President, the Treasury Department, and the governor whereby tolls would be set high enough to cover operating expenses of the canal, "interest," and the cost of civil government in the Canal Zone. Canal users protested that the cost formula was unfair to them, and in later years tolls were set much

[2] Act of Sept. 26, 1950, 64 Stat. 1038, amending Title 2, §§411, 412, of the Canal Zone Code, approved June 19, 1934, 48 Stat. 1122. The Canal Zone Code does not constitute a part of the United States Code.

lower than the formula would have required. As expenses rose, the toll rate required by the formula became greater than the statutory maximum of $1.00, while the toll remained constant at 90 cents a laden ton.

Meanwhile Panama Railroad Company, which bore very little of the burden of government in the Canal Zone, continued its highly profitable operations, returning a surplus to the Treasury. The corporation made no financial reports to Congress and was not supervised by the Bureau of the Budget or the General Accounting Office. In 1948 to obtain greater financial supervision Congress reorganized the defendant's predecessor under federal law as a government corporation,[3] subjecting it to the requirements of the Government Corporation Control Act of 1945.[4] Henceforth it was required to keep books in the fashion of a commercial business for annual submission to Congress after Presidential revision, and it was to be audited periodically by the General Accounting Office, which, in turn, reported to Congress.

The same year President Truman announced a rise in canal tolls to $1.00 per laden ton to meet continuing deficits from The Panama Canal. When the shipping industry responded with severe protests the increase was deferred pending study by congressional committees and the Bureau of the Budget. A three-cornered struggle developed. The railroads wanted to prevent what they considered a subsidy to shipping—operation of the canal below "cost." The Bureau of the Budget wanted increased revenue from the canal operation and better bookkeeping procedures. The shipping lines wanted revision of the formula for determining "costs" of the canal to enable the canal to be "self-sustaining" without greatly raising tolls.

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[3] Act of June 29, 1948, 62 Stat. 1075.

[4] 59 Stat. 597, 31 U. S. C. §§841-871.

Appendix A

(Court of Appeals Opinion)

The resulting compromise is the statute now before us. Ownership of the physical properties of the canal was transferred from the governor's agency to the defendant corporation, now rechristened Panama Canal Company, which was to be operated by its board of directors like a commercial business, dealing with other government agencies on a business footing and meeting its expenditure from its own income. The cost of civil government in the Canal Zone was to be borne by the defendant, in lieu of taxes; and this cost was to be apportioned among the various business enterprises equitably, thus relieving the former heavy burden on the canal operation. As part of the new scheme, toll-making authority was transferred from the President to the defendant, and the statutory maxima and minima were removed. Tolls were to be set to cover costs, which were defined by statute for the first time; and the new cost formula was made more favorable to canal users than the previous informal arrangement of the President, the Treasury Department, and the governor.[5]

Both Congress and the President retained some control over toll-fixing. The annual budget reports to Congress and the periodic GAO audits required under the Government Corporation Control Act would henceforth cover the operation of the canal, now that it, too, was run by the defendant. The President retained the power to appoint the members of the defendant's board of directors, and no change in tolls could be made without his approval.

For three years after passage of the Act the defendant submitted its annual budgets to Congress, reporting a profit from its combined operations, but not allocating the cost of interest or civil government among its various enter-

[5] The major changes were that interest during construction was no longer included in capital investment; costs of civil government were no longer borne almost exclusively by the canal users; interest was reduced to commercial rates; and military vessels were to pay for their transits. A proposal t allocate half the cost of the canal to national defense was rejected.

prises.[6] No objections were taken to these budgets by Congress and no steps were taken by the defendant to change toll rates. The present controversy began in 1955 when the General Accounting Office completed its audit of the defendant and reported:

> "* * * The Company, as a whole, has been self-sustaining. However, the Company did not have available for our examination an analysis to determine the financial results by activities. We have prepared such an analysis by allocating general corporate expenses (interest, net cost of Canal Zone Government and administrative and other general expenses) to the activity operating results reported by the Company. * * *
>
> "The analysis of the Company, reported net income of $13,000,000 for 3 years since the reorganization shows that, contrary to the apparent expectation of the Congress, the canal activity had a net income of $28,000,000 and business activities had losses of $15,000,000. * * *
>
> "* * * Thus the net income from the canal activity is being used to offset losses from business activities.
>
> "* * * We interpret the legislation as precluding any losses sustained by the Panama Canal Company in the operation and maintenance of business facilities being included in the basis for determining tolls under section 412(b). Based on the financial results of the canal activity for the past 3 years, toll rates would have to be reduced substantially if hearings were held at this time."[7]

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[6] Defendant's annual reports for the fiscal years ending June 30, 1952, 1953, and 1954, were attached as exhibits to an affidavit submitted by the plaintiffs. Criticism of the defendant's reports is detailed in the Comptroller General's Audit Report to the Congress of the United States on Panama Canal Company and Canal Zone Government for the Fiscal Year Ended June 30, 1955, 29-30 (hereafter cited as 1955 Audit).

[7] Report on Audit of Panama Canal Zone Government for the Fiscal Year Ended June 30, 1954, 2-3.

Appendix A

(Court of Appeals Opinion)

The GAO attributed the loss from other business activities to inefficient management, reapportionment of the burden of civil government, and a diminished market for the goods and services of these enterprises.[8] The unexpected profit of the canal operation probably stems from the steady increase in foreign commercial volume since 1947.[9] The General Accounting Office did not believe that existing legislation authorized the defendant to continue recovering business activity losses through canal tolls and unsuccessfully sought amendment of §412(b) of the 1950 Act to accomplish that end.[10]

Judge Walsh rejected the General Accounting Office's construction of the 1950 amendments, which the plaintiffs support, and approved that of defendant Panama Canal Company. We turn first to this question of statutory interpretation.

I. Meaning of the 1950 Statute

A. Statutory Text. The old and new versions of §§411 and 412 are printed in the margin for comparison, since the first phase of argument concerns the significance of the changes in wording adopted in 1951.[11] The defendant views

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[8] 1955 Audit, 34-36.

[9] In the four years after the transfer of the canal to the defendant, foreign toll revenues rose from $16,935,823 to $23,442,170 per year, while American tolls went from $9,986,708 to $10,407,307. 1955 Audit, 3.

Congress had recognized that future tolls would depend on the volume of traffic, *e.g.*, Sen. Rep. No. 2531, 81st Cong., 2d Sess. 5 (1950), but had not anticipated a rise in volume of such proportions. Shipping line representatives had testified that American commercial volume was declining, while government spokesmen pointed out that the total volume of commercial shipping had gone up sharply in the past year. Hearings before the Subcommittee on Maintenance and Operation of the Panama Canal of the Senate Committee on Armed Services, 81st Cong., 2d Sess. 16, 20, 39 (1950).

[10] 1955 Audit, 1-4, 19.

[11] "Chapter 23.—Tolls for Use of Canal.

"411. Authority [of President] to Prescribe [and Change] Measurement Rules and Tolls.—The [President] *Panama Canal*

Appendix A

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§411 as controlling and finds great significance in the use of the verb "authorizes," which it contrasts with the man-

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Company is authorized [subject to the provisions of the section next following] to prescribe and from time to time change *(1) the rules for the measurement of vessels for the Panama Canal, and (2), subject to the provisions of the section next following,* the tolls that shall be levied [by the Government of the United States] for the use of the Panama Canal [, but no tolls when prescribed as above shall be changed unless six months' notice is given by the President by proclamation.] : *Provided, however, That the rules of measurement, and the rates of tolls, prevailing on the effective date of this amended section shall continue in effect until changed as provided in this section: Provided further, That the said corporation shall give six months' notice, by publication in the Federal Register, of any and all proposed changes in rates of tolls, during which period a public hearing shall be conducted: And provided further, That changes in basic rules of measurement and changes in rates of tolls shall be subject to, and shall take effect upon, the approval of the President of the United States, whose action in such matter shall be final and conclusive.*

"412. BASES OF TOLLS [; MAXIMUM AND MINIMUM RATES].—*(a)* Tolls on merchant vessels, army and navy transports, colliers, *tankers,* hospital ships, supply ships, and yachts shall be based on net vessel tons of one hundred cubic feet each of actual earning capacity determined in accordance with the [Rules]. *rules* for the [Measurement] *measurement* of [Vessels] *vessels* for the Panama Canal, [prescribed by the President and as may be modified by him from time to time by proclamation,] and tolls on other floating craft shall be based on displacement tonnage. [Provided, That the basic rules of measurement shall not be changed except after public hearing and six months' public notice of such change. The rate of tolls on laden vessels shall not exceed $1, nor be less than $0.75 per net vessel ton as determined under the aforesaid rules, and] *The rate of tolls* on vessels in ballast without passengers or cargo [the rate] may be less than the rate of tolls for vessels with passengers or cargo. [In addition to the tolls based on measurement or displacement tonnage, tolls may be levied on passengers at rates not to exceed $1.50 for each passenger.]

"(b) Tolls shall be prescribed at a rate or rates calculated to cover, as nearly as practicable, all costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto, including interest and depreciation, and an appropriate share of the net costs of operation of the agency known as the Canal Zone Government. In the determination of such appropriate share, substantial weight shall be given to the ratio of the estimated gross revenues from tolls to the estimated total gross revenues of the said corporation exclusive of the cost of commodities resold, and exclusive of revenues arising from transactions within the said corporation or from transactions with the Canal Zone Government.

"(c) Vessels operated by the United States, including warships, naval tenders, colliers, tankers, transports, hospital ships, and other vessels owned or chartered by the United States for transporting troops or supplies, may in the discretion of the President of the United States

datory word "shall," found in other parts of the statute.[12] The plaintiffs reply that §411 merely identifies the person delegated with toll-fixing power and prescribes the procedure, while the obligation to set tolls according to formula flows from §412, where the mandatory language is found.

Defendant next points to the retention in §411 of the words "prescribe and from time to time change" which were also used in the earlier version of the statute conferring discretionary power on the President. From this we are asked to infer that similar discretionary power is to be exercised by the new authority. Plaintiffs reply that the old scheme was only discretionary within statutory limits and that on occasion the President sought congressional approval even for changes within these limits.[13] They also cite the first section of Article III of the Hay-Pauncefote Treaty of November 18, 1901, restricting Presidential dis-

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be required to pay tolls. In the event, however, that such vessels are not required to pay tolls, the tolls thereon shall nevertheless be computed and the amounts thereof shall be treated as revenues of the Panama Canal Company for the purpose of prescribing the rates of tolls, and shall be offset against the obligations of the said corporation under paragraphs (c) and (e) of section 240 of this title, as amended.

"*(d)* The levy of tolls is subject to the provisions of section 1 of article *III of the treaty between the United States of America and Great Britain concluded on November 18, 1901, of articles XVIII and* XIX of the convention between the United States of America and the Republic of Panama [entered into] *concluded on* November 18, 1903, and of article I of the treaty between the United States of America and the Republic of Colombia proclaimed on March 30, 1922.

"*(e) Capital investment for interest purposes shall not include any interest during construction.*"

[12] And see, *e.g.*, *U. S. ex rel. McLennan* v. *Wilbur*, 283 U. S. 414, 418, 420; *U. S. ex rel. Simons* v. *Hines*, D. C. Cir., 69 F. 2d 229. But see *Supervisors* v. *United States*, 71 U. S. 435, 4 Wall. 435, 445-447; *United States Sugar Equalization Board* v. *P. De Ronde & Co.*, 3 Cir., 7 F. 2d 981, 985-986, certiorari dismissed 273 U. S. 691.

[13] In 1937 confusion over the statutory definition of tonnage led President Roosevelt to appoint a committee, which recommended revision of §412 to provide for measurement rules. Sen. Doc. No. 23, 75th Cong., 1st Sess. On August 24, 1937, the committee's recommendation was enacted by Congress, 50 Stat. 750, and the President revised tolls accordingly three days later. Presidential Proclamation No. 2248, 2 Fed. Reg. 1765-1774.

cretion by the requirement that all tolls be "just and equitable."[14]

The transposition of the phrase "subject to the provisions of the section next following" to modify the word "change," instead of the word "authorized," indicates to the defendant that the mandatory provisions of §412 were applicable only when and if changes in tolls were attempted. Plaintiffs however contend that the transposition, if at all significant, meant only that toll-making was subject to §412, while the rules for measuring vessels were not. The plaintiffs also say that another part of the statute making the legislation effective as of the time when the President transferred the canal to the corporation[15] answers the defendant's claim that §§411 and 412 fail to specify when the formula should go into effect, thus indicating discretion to delay utilizing the new scheme.

Finally, the defendant draws us to the proviso in §411 that "the rates of tolls, prevailing on the effective date of this amended section shall continue in effect until changed as provided in this section." But this may have been intended to continue the legal authority of the old tolls fixed by the President during the interregnum when the President was no longer authorized to promulgate tolls and his corporate successor had not yet promulgated any, and would not be inconsistent with plaintiffs' position.

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[14] "The United States adopts, as the basis of the neutralization of such ship canal, the following Rules, substantially as embodied in the Convention of Constantinople, signed the 28th October, 1888, for the free navigation of the Suez Canal, that is to say:

"'1. The canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable.'" 32 Stat. 1903. The treaty is incorporated by reference into §412(d), Tit. 2, of the Canal Zone Code.

[15] Act of Sept. 26, 1950, §14, 64 Stat. 1043. The transfer occurred July 1, 1951. Exec. Order No. 10263, 16 Fed. Reg. 6333.

Summing up, the defendant would read the two sections as governing any future effort to change tolls, but leaving it entirely up to the defendant when and if any changes should be attempted. The plaintiffs just as cogently glean from the language a requirement that once the properties of the canal are given to the defendant the new formula must be applied with reasonable speed. Both interpretations are reasonable from the naked words, and we must seek further for their meaning.

B. Legislative History. During the three-year legislative progress of the statute there was no discussion of the possibility that the new law would work out to mean a drop in toll rates which the defendant might be reluctant to announce. The universal assumption of legislators and lobbyists was that the new § 412 would authorize an increase in some amount,[16] which the defendant would announce as soon as the necessary computations were completed.[17] The shipping industry, for example, lobbied to place a $1.00 maximum on tolls, holding the rise to 10 cents a laden ton.[18] The old informal formula of the President, the Treasury Department and the governor had long indicated that an increase was in order;[19] and

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[16] Hearings, *supra* note 9, at 8, 15, 28; Hearings before the Subcommittee on the Panama Canal of the House Committee on Merchant Marine and Fisheries, 81st Cong., 2d Sess. 68, 141 (1950); Sen. Rep. No. 2531, 81st Cong., 2d Sess. 5 (1950); 96 Cong. Rec. 13375, 14672 (1950).

[17] The Bureau of the Budget, which presented the bill which became law, expected the computations to take one year. A Report and Recommendations of the Bureau of the Budget, H. R. Doc. No. 460, 81st Cong., 2d Sess. 16 (1950) (hereafter, Bureau of the Budget Report); Hearings, *supra* note 16, at 48.

[18] *E.g.*, Hearings, *supra* note 16, at 76-82; Hearings, *supra* note 9, at 11-17. The proposal passed the House, but was rejected by the Senate Committee. Sen. Rep. No. 2531, 81st Cong., 2d Sess. 4 (1950).

[19] The last time the old formula indicated the propriety of reducing tolls was in 1931, and the following year, the formula was revised to remove the national defense write-off of some canal costs. Hearings, *supra* note 9, at 30. At the time the 1950 statute was passed, application of the old formula would have meant an increase of from 45 to 50 cents per ton. Hearings, *supra* note 9, at 7, 17, 24.

since 1948 the President had been impatient to proclaim the maximum statutory toll.[20] The major concern was that the defendant might be required by rising costs to raise tolls to the point where the intercoastal shipping industry could no longer compete with the railroads,[21] and the statutory proviso that toll increases be approved by the President was designed to safeguard the ship lines in that eventuality.[22]

The scope of the defendant's discretion must therefore be inferred from the general scheme of regulation which Congress created. The major change was the transfer of toll-making authority from the President to a government corporation organized on commercial lines. This was coupled with abandonment of the old statutory maxima and minima in favor of a single requirement that tolls cover costs. The latter were carefully delineated by Congress for the first time. These changes together spell an intention to change toll-making from a political decision made by the President to an economic decision made by the defendant corporation.[23]

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[20] On March 26, 1948, President Truman proclaimed a toll rise effective in six months. Presidential Proclamation No. 2775, 3 CFR 30 (1948 Supp.). The effective date was postponed to March 1, 1949, September 1, 1949, March 1, 1950, and finally March 1, 1951, while Congress considered the present statute; and upon passage of the present law the original announcement of an increase was revoked. Presidential Proclamation No. 2903, 3 CFR 56 (1950 Supp.), revoking Proclamations 2775, 2808, 2831, 2852 and 2875.

[21] Hearings, *supra* note 9, at 11, 14-16, 27, 36, 39; Hearings, *supra* note 16, at 67-69, 82-83, 102-125, 133-134, 142-152.

[22] Hearings, *supra* note 9, at 7; Bureau of the Budget Report at 17.

[23] *E.g.*, "If there is agreement as to the formula for establishing the toll rates and adequate business-type accounts and financial reporting, there is no sound reason for not delegating the rate-making function to the Company's Board of Directors, as has been done in the case of other Government corporations, such as TVA, which set the rates to be charged for their services." Statement of Harold Seidman, Accompanied by Russell Roane, Representing the Bureau of the Budget, Hearings, *supra* note 9, at 7, and Hearings, *supra* note 16, at 46. See also Bureau of the Budget Report at 16.

Throughout the hearings and debate it was assumed that, under the new law, tolls would be set by the defendant to make the canal self-sustaining, and there was virtually no mention of the President's veto power. Hearings, *supra* note 9, at 9, 11, 18, 27, 36; Hearings, *supra* note 16, at 54, 66, 68, 133, 139; 96 Cong. Rec. 13371-13380, 14671-14672.

Appendix A

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A certain latitude was allowed the defendant in deciding how frequently to change tolls, but this was limited by the requirement that in the long run tolls must reflect costs.[24] Congress was expected to review these short-range decisions with the aid of the defendant's annual budgets, but neither Congress nor the defendant was authorized to ignore the statutory formula indefinitely for reasons of policy or convenience.[25]

This last power was given the President, apparently to protect the American shipping industry.[26] Exercise of the Presidential veto was hardly discussed during the legislative history of the Act, and the apparent assumption of all concerned was that as a general rule the defendant's rate changes would become law. It was clear to Congress that the Hay-Pauncefote Treaty forbade discrimination against foreign vessels, so that any Presidential veto of rate increases would have to subsidize not only American lines, but the foreign lines, which comprised more than half the canal's commercial volume.[27]

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[24] "The present basis of establishing tolls rates does not lend itself to the ready adjustment of rates, either up or down, to reflect increases or decreases in costs or changes in commercial conditions. * * * It is significant that the tolls rates have not been changed under this formula since 1938.

"* * *

"While the tolls rate should not be changed on a year-to-year basis since 1 year's experience is insufficient to reflect accurately long-range trends, the rate should be adjusted periodically as changes take place in the factors that determine the charges that should be made for the use of the Canal. As the 1937 special committee expressed it:

"'Economic and commercial conditions are not static. The Panama Canal is a facility for the service of interoceanic commerce. The charges for the service should receive such adjustments from time to time as will keep the charges in harmony with the needs of the Canal and the requirements that must be met in making the Canal the servant and assistant of international intercourse.'" Bureau of the Budget Report at 16.

Congress recognized the possibility that in the long run the new formula might require reduction of tolls. Bureau of the Budget Report at 16; Hearings, *supra* note 9, at 18, 36; Hearings, *supra* note 16, at 139; Sen. Rep. No. 2531, 81st Cong., 2d Sess. 5 (1950).

[25] Hearings, *supra* note 16, at 49-50.

[26] Notes 21, 22 *supra*.

[27] Hearings, *supra* note 9, at 13, 23; Hearings, *supra* note 16, at 67, 146-147, 96 Cong. Rec. 13373-13379.

Appendix A

(Court of Appeals Opinion)

That the defendant would defer toll changes in order to apply canal profits to cover its losses in other enterprises never occurred to the legislators. Although the cost formulae of the other ventures were not spelled out in the statute, each enterprise was expected to be self sustaining[28] and the annual commercial-style budget of the defendant corporation was expected to facilitate congressional scrutiny of the various operations. Until the GAO audit the defendant's ambiguous bookkeeping concealed the fact that the Treasury was being deprived of profits made in operating the canal, so that consumers of goods and services furnished by the other ventures could enjoy them below cost—the very type of subsidy the Government Corporation Control Act and the 1950 amendments to the Panama Canal Act were designed to prevent. The men who spent three years hammering out a compromise toll formula for future operation of the canal did not mean to give the defendant's board of directors carte blanche to ignore the statutory mandate whenever the defendant's other business ventures were losing money.

We conclude that Panama Canal Company was expected to propose changes in tolls for Presidential approval whenever it became apparent that tolls were substantially out of line with costs. While it was given discretion to defer proposals of change for short periods of time where it believed the discrepancy between costs and revenue was due to a temporary factor, it could not delay such proposals unreasonably long.

II. Defendant's Asserted Discretion to Delay

Defendant contends that, even if it was required to propose changes with reasonable frequency, it has been justi-

[28] Bureau of the Budget Report at 14; Hearings, *supra* note 9, at 8, 18-19, 22; Hearings, *supra* note 16, at 66-67, 74; Sen. Rep. No. 2531, 81st Cong., 2d Sess. 4 (1950); H. R. Rep. No. 2935, 81st Cong., 2d Sess. 3 (1950).

fied in delaying action until an appraisal of the property was completed, without which depreciation and interest could not be accurately estimated.[29] The appraisal has now been finished and further delay cannot be justified on that ground.[30] It further suggests that the Korean War, pending legislation to alter §412, and the 1955 treaty with Panama have introduced "uncertainty rendering it unwise to change tolls at the present time." It has been five years since the new formula went into effect and almost two decades since the tolls were last changed. Uncertainty has become the norm in world affairs. The legislative policy is to make tolls reflect changes in these uncertainties, and not to suspend all changes until world conditions become static;[31] further delay is not an exercise of the defendant's conceded discretion to determine the frequency of toll changes, but an arbitrary refusal to obey the mandatory requirement of §412 that tolls be set in accord with costs,

III. Judicial Review of Administrative Non-Action

We thus reach the question of judicial review. Judge Walsh stated his conclusion that such review was not intended by Congress in several ways: failure to join the United States as an indispensable party; no standing to sue; inability to compel a government officer to exercise his discretion by writ of mandamus; and lack of finality in the defendant's action, which is subject to Presidential revision. On appeal defendant also suggests that a district court outside the District of Columbia lacks power to issue

[29] The defendant gives as its reason for not promulgating new tolls on its estimate of the property's value: "In view of the policy that tolls should remain stable over a period of years, it is evident that Congress did not intend tolls to be determined upon so tenuous and temporary a basis." Defendant Appellee's Brief, p. 42.

[30] *Id.* p. 43.

[31] See note 24 *supra*.

writs of mandamus, and that courts should not review the management of the public domain.

There is nothing in §§411 and 412 expressly authorizing or expressly precluding judicial review. Unless constitutional limitations exist, our power to grant relief in the premises is a matter of congressional will; and these various doctrines only point up relevant factors in our search for the silent legislative intent. We turn first to the problem of Presidential revision.

Defendant states, and we agree, that we have no power to review government decisions which are not final, and that tolls proposed by the defendant, but not yet approved by the President, lack the requisite finality. *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.*, 333 U. S. 103; *Pan American Airways Co.* v. *C. A. B.*, 2 Cir., 121 F. 2d 810. In this suit, however, we are concerned not with proposed rate changes, but with the defendant's refusal to make such proposals—a decision which has finality and which is certainly effective without any approval by the President. The defendant's refusal to start the machinery for toll changes is like a court's refusal to start the process of adjudication by granting a defendant's motion to dismiss a complaint. Such a decision is a final order, although the opposite decision, denying the motion, would not be.

From the cases of *Chicago & Southern Air Lines* v. *Waterman S. S. Corp., supra*, 333 U. S. 103, and *Pan American Airways Co.* v. *C. A. B., supra*, 2 Cir., 121 F. 2d 810, the defendant argues that, where Congress establishes an agency whose decisions require Presidential approval, all judicial examination of the agency's action or inaction is precluded. But the cases will not support so broad a proposition. Both those cases dealt with the construction of §1006 of the Civil Aeronautics Act, 49 U. S. C. §646, which authorizes judicial review of certain orders of the Civil Aeronautics Board; and the decision of this court and the

Supreme Court was that the section did not authorize review of Board orders granting or denying citizen carriers' applications for certificates of convenience and necessity to engage in overseas and foreign air transportation. Justice Jackson, writing for the Supreme Court majority, did not state the sweeping proposition now urged to us, but listed the factors which led him to conclude that §1006 was not meant to include review of that type of agency decision: (1) Congress had expressly precluded judicial review of foreign carriers' applications to engage in foreign or overseas routes, suggesting a similar policy toward domestic carriers' applications of the identical kind; (2) air commerce, by virtue of its third dimension, novelty, and danger, poses special problems not present in the regulation of ship, truck, or train transportation; (3) aerial navigation routes and bases must be correlated with national defense plans and the conduct of foreign relations; (4) the express scheme for review of CAB decisions was to permit it where the Board performed conventional functions and to preclude it where the Board inverted the usual administrative process and acted as adviser to the President; (5) the President's role in the statutory plan was to coordinate legislative and executive powers to further the commercial, strategic, and diplomatic interests of this country in the realm of foreign affairs.

None of these considerations are present here. The defendant is a government corporation, expressly made suable on all its decisions without reservation. The subject matter being regulated—marine transportation—is familiar to the courts, as is the process of rate-making. The defendant's decisions are not complicated by factors of diplomacy or national defense, since the Hay-Pauncefote Treaty forbids use of the canal toll rate as a weapon of foreign policy. Accordingly the defendant's decisions will not involve national defense data and secret foreign intelligence,

as was the case under the Civil Aeronautics Act.[32] The CAB's standard of "convenience and necessity" was much more vague than the formula expressed in §412 to which the defendant corporation is to be held; and the type of CAB decisions discussed by the Supreme Court concerned the rate of expansion of the air transport industry, rather than, as here, the price to be paid by consumers to a government monopoly for services of a type frequently supplied by a public utility.[33]

It may be significant that review was sought in the case before the Supreme Court at a much later stage than here. There "submission of the Board's decision was made to the President, who disapproved certain portions of it and advised the Board of the changes which he required. The Board complied and submitted a revised order and opinion which the President approved. Only then were they made public, and that which was made public and which is before us is only the final order and opinion containing the President's amendments and bearing his approval." *Chicago & Southern Air Lines* v. *Waterman S. S. Corp., supra,* 333 U. S. 103, 110. It may well be that no judicial review would be possible once the defendant's original proposal has been altered to conform with the President's political decision,[34] but that question is not now before us.

Panama Canal Company claims that we cannot now ignore the question, however, since it would be irresponsible to mandamus the defendant to action which would then be

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[32] *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.*, 333 U. S. 103, 111-112. Unlike the present law, the statute before the Supreme Court provided that CAB decisions "shall be submitted to the President before publication thereof." 49 U. S. C. §601.

[33] At the time the present statute was passed the most comparable waterway was the Suez Canal, then privately-owned. The tolls policy in Suez was frequently compared with that in Panama, Hearings, *supra*, note 9, at 34, 37; Hearings, *supra*, note 16, at 69-70, 135, 137-138, 142; 96 Cong. Rec. 13373; and the international treaty incorporated in §412(d) of the present statute was modeled on that governing the Suez Canal. See note 14 *supra*.

[34] *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.*, 333 U. S. 103, 112-114; but see *Shaughnessy* v. *Pedreiro*, 349 U. S. 48.

beyond judicial scrutiny. Assuming that this is true, it appears that in the normal situation tolls would be set by the defendant and approved by the President without alteration; there would then be no obstacle to court review. Although, on occasion, the President may intervene and thus preclude judicial review of the new rates, the mere possibility of frustration should not deprive the district court of the power to take the first step. See *Virginian R. Co.* v. *System Federation No. 40*, 300 U. S. 515; *Wilbur* v. *U. S. ex rel. Kadrie*, 281 U. S. 206, 218.

Nor is the defendant a mere adviser to the President of the type discussed in *United States* v. *George S. Bush & Co.*, 310 U. S. 371—a decision under the Tariff Act of 1930 (46 Stat. 590). The Act authorized the Tariff Commission to recommend increases in the statutory import duties if existing duties failed to equalize production costs of foreign and domestic articles. A recommendation to increase the duty on canned clams was approved by the President with the statutory finding that "in his judgment such rates of duty are shown by such investigation of the commission to be necessary to equalize such differences in costs of production." The Court of Customs and Patent Appeals, authorized to review "a question or questions of law only," held the increase invalid because in computing the cost of Japanese production the Commission and the President converted yen into dollars at the 1932 rate of exchange, instead of the rate of earlier years before Japan went off the gold standard. The Congress had deliberately failed to specify the year on which exchange rates should be computed, and the President's method of solving the problem was held nonreviewable by the Supreme Court. "Whatever may be the scope of appellate jurisdiction conferred by §501 of the Tariff Act of 1930, it certainly does not permit judicial examination of the judgment of the President that the rates of duty recommended by the Commission are

necessary to equalize the differences in the domestic and foreign costs of production." *United States* v. *George S. Bush & Co.*, *supra*, 310 U. S. 371, 379. The Court carefully limited its language to tariff acts, where for a century the President had been given wide discretion to make such decisions; and it noted that the Tariff Commission had traditionally acted as an adviser only, either to Congress or to the President. The differences between the background, subject matter, and language of the tariff statute and the present law dispel any inference that Congress intended the same scope of review for canal users as for importers of foreign commodities.

Even assuming the scope of review under that statute and this one to be the same, we think the Supreme Court would have allowed the Court of Customs and Patent Appeals to act in the event the Tariff Commission, like the present defendant, boldly refused to hold any hearings concerning rate changes despite adequate indications that changes were necessary to comply with the statutory formula. The present case would be more comparable to the *Bush* decision if the present plaintiffs were trying to declare new tolls invalid because of the type of depreciation computation chosen by the agency and approved by the President.

Before 1950 the President was authorized to set tolls, and the epithet "adviser" could properly be applied to the governor of The Panama Canal. But if the changes in §411 are to have any meaning the defendant is now the rate maker, and not a counselor. The legislative history similarly supports this.

As a last resort the defendant presses on us cases involving administration of the public domain;[35] but the

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[35] *E.g.*, *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 474; *Butte City Water Co.* v. *Baker*, 196 U. S. 119, 126; *Alabama* v. *Texas*, 347 U. S. 272, 273; *United States* v. *San Francisco*, 310 U. S. 16, 29-30; *Light* v. *United States*, 220 U. S. 523, 537. *Cf.* Section 4 of the Administrative Procedure Act exempting from some rule making requirements "any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." 60 Stat. 238, 5 U. S. C. §1003.

problems presented by them are far removed from those of a government corporation, organized on a commercial model, charging consumers for the type of services ordinarily supplied by private enterprise. Moreover, the public domain cases have no factor analogous to the treaty—the Hay-Pauncefote Treaty, *supra*—which here binds the government to conduct its venture in a fashion that will provide fair and equitable tolls for users of all lands. Compare *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 128, 129, which the defendant cites.

The growing tendency of the courts and Congress has been to submit more matters once thought to concern internal government administration to examination in open court. See, *e.g.*, *Honovich* v. *Chapman*, D. C. Cir., 194 F. 2d 761 (Secretary of the Interior's regulations concerning Indians' wills); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123 (Attorney-General's listing of organizations for use in screening government personnel); *Schachtman* v. *Dulles*, D. C. Cir., 225 F. 2d 938 (passport denial); *Textile Workers Union of America* v. *Allendale Co.*, D. C. Cir., 226 F. 2d 765 (Walsh-Healey Act determinations reviewable under the Fulbright Amendment, 66 Stat. 308, 41 U. S. C. §43a, which overruled *Perkins* v. *Lukens Steel Co.*, *supra*, 310 U. S. 113); Administrative Procedure Act, 5 U. S. C. §1009(c), "every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review." We think the intent of Congress was to allow judicial review in these circumstances.

Nor is there any lack of standing to sue. Section 10(a) of the Administrative Procedure Act, 5 U. S. C. §1009(a), confers standing on persons "suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute," and the plaintiffs can point to the Panama Canal Act of 1912,

as amended in 1951, as well as the Hay-Pauncefote Treaty as their statutory authority. Moreover, without legislation they have a right to judicial redress, since the corporation's action in charging tolls in excess of the statutory rate was "of a sort that, if taken by a private person, would create a right of action cognizable by the courts."[36] *Joint Anti-Fascist Refugee Committee* v. *McGrath*, *supra*, 341 U. S. 123, 152 (concurring opinion of Justice Frankfurter).

Here there is no controversy over the proper person to sue; all users of the canal have been joined in a single class action. The question is rather whether or not there is to be judicial review, since a finding of no standing here means that the courts have no power in the premises. See *Joint Anti-Fascist Refugee Committee* v. *McGrath*, *supra*, 341 U. S. 123, 186 (concurring opinion of Justice Jackson). From all that has gone before we conclude that court relief was not precluded and that the plaintiffs may seek it.

A final argument is made that legislative and executive supervision is sufficient and that judicial interference will prove cumbersome. The President's power to remove members of the defendant's board of directors and his veto power are stressed in this connection, as well as the supervisory power wielded by Congress through annual appropriation bills. But identical balances and checks rein most government agencies, whose decisions are nevertheless subject to judicial scrutiny. For the person unable to get redress from the busy legislature or White House the courts remain open.

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[36] The right of a consumer to sue a utility which charges excessive tolls is established, *e.g.*, *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 436; *United States* v. *Public Utilities Commission of District of Columbia*, D. C. Cir., 151 F. 2d 609; *Richman* v. *Consolidated Gas Co. of New York*, 114 App. Div. 216, 100 N. Y. S. 81, affirmed 186 N. Y. 209, 78 N. E. 871.

Appendix A

(Court of Appeals Opinion)

IV. The United States as Indispensable Party

The holding that the United States was an indispensable party applies, as we understand the opinion below, only in so far as the plaintiffs seek to recover money from the defendant, and not to the request for injunctive or mandamus relief. We do not pass on the necessity for joining the United States as defendant, since we think a money recovery is precluded by other considerations. Restitution of overcharges would require determination of the tolls that should have been set. Although the district court might reconstruct the tolls which the defendant corporation should have promulgated, there is no way of knowing whether or not the President would have approved them. Moreover, there is no statutory authority for utilizing the defendant's facilities for measuring the amount of money to be awarded the plaintiffs in suits to recover overcharges. See *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246, 253-255. We find no evidence of a congressional intent to allow recovery of overcharges.

V. Availability of the Remedy of Mandatory Injunction

Panama Canal Company's last argument rests on the doctrine that federal courts outside the District of Columbia lack statutory authority to issue writs of mandamus against government officers in the exercise of their original jurisdiction. *McIntire* v. *Wood*, 11 U. S. 504, 7 Cranch 504; *Rosenbaum* v. *Bauer*, 120 U. S. 450; *Knapp* v. *Lake Shore & M. S. R. Co.*, 197 U. S. 536; *Covington & C. Bridge Co.* v. *Hager*, 203 U. S. 109. The lower federal courts have not been consistent in handling efforts to avoid this doctrine by actions for mandatory injunctions or declaratory judgment;[37] but we need not review those cases, since the

[37] See Note, 38 Col. L. Rev. 903 (1938).

McIntire line of cases is inapplicable to an action like the present one against a corporation, *Virginian R. Co.* v. *System Federation No. 40, supra,* 300 U. S. 515, affirming 4 Cir., 84 F. 2d 641, 646. The present situation is even more favorable for issuing a mandatory injunction, since by congressional legislation the defendant was made suable in New York, rather than in the District of Columbia.

We conclude that the judgment of dismissal for the defendant should be reversed and summary judgment should be entered for the plaintiffs on their motion therefor to the extent set forth in, and in accordance with, this opinion.

Reversed and remanded for judgment for the plaintiffs.

APPENDIX B

Stay Memorandum of Justice Harlan*

[May 7, 1957.]

MR. JUSTICE HARLAN, Associate Justice.

This is an application by the Panama Canal Company, a government instrumentality, for a stay of the mandate of the Court of Appeals, pending determination by the Solicitor General as to whether certiorari should be sought to review the decision below and pending further proceedings in this Court, if certiorari is applied for. The Assistant Attorney General in charge of the case has advised me that he has recommended to the Solicitor General that a petition for certiorari be filed.

The controversy relates to the duties of the petitioner, Panama Canal Company, under the Act of September 26, 1950, 64 Stat. 1038, with respect to establishing tolls for the use of the Canal. The District Court dismissed the complaint, considering that the court had no jurisdiction of the subject matter of the suit, and that the respondent steamship companies had no standing to sue. The Court of Appeals reversed as to the jurisdictional question, and as to the merits, granted summary judgment in favor of the steamship companies. The effect of that decision, as both sides seem to agree, is (a) to require the Panama Canal Company to proceed with a revision of the Canal tolls, in accordance with the Court of Appeals' construction of the 1950 Act, and the accounting views of the General Accounting Office, whose correctness is disputed by the Panama Canal Company; and (b) to deny the steamship companies recovery for excessive past rates, if the revised tolls should turn out to be lower. The Court of Appeals (Chief Judge Clark and Judge Hincks) denied

* The memorandum of May 7 sets forth in a footnote the memorandum of the Court of Appeals denying a stay (Appx. B, 26). The memorandum of May 7 is presented as amended by a supplemental memorandum of May 16.

petitioner's application for a stay pending review by this Court.*

After hearing the parties and considering their memoranda. I am of the opinion that a stay should issue. Without intimating any views as to the merits, I think the character of the questions involved is such that it cannot be said that it is unlikely that certiorari will be granted. While I recognize the force of the steamship companies' argument that if the decision of the Court of Appeals ultimately stands, the companies will have no recourse for alleged excessive tolls paid by them during the period of a stay, I regard the strength of this contention as being outweighed by the undesirability of requiring the Panama Canal Company to go forward with revamping its entire toll structure, until its duty to do so, and the principles on which it should proceed, are finally adjudicated in this litigation. Apart from all else, the fixing of such tolls is not alone a commercial undertaking, but also one that involves this country's relations with the foreign governments whose nationals are users of the Canal.

I am constrained to accept the Government's representations that the uncertainties and confusion which might ensue from requiring the Panama Canal Company to proceed before this litigation is over might embarrass our relations with such foreign governments. And because of the peculiar position occupied by the Panama Canal Company as a political instrumentality, it seems to me

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*The memorandum of the Court of Appeals is as follows: "Motion denied. In view of the heavy accumulating loss to plaintiffs by defendant's failure to perform what this court holds to be its legal obligation and of the ease with which it can seek interim relief from the Supreme Court or a Justice thereof if we are in error, a stay of the mandate to prevent even a beginning in the lengthy steps necessary towards compliance with the court's order is not in the interest of justice."

Appendix B

(Stay Memorandum of Justice Harlan)

that it should not be required to go forward under the Court of Appeals' decision until the issues in this controversy are settled. I think the particular interim interests of these steamship companies must yield to the broader concerns involved in having this litigation proceed to an orderly final conclusion.

I am informed by respondents that they have ascertained that the mandate of the Court of Appeals has gone to the District Court. I shall therefore stay all further proceedings under that mandate pending the filing and determination of the petitioner's petition for certiorari in this Court, upon condition, however, that the petition for certiorari is filed within the time prescribed by law. 28 U. S. C. §2101 (c).

May 7, 1957.

APPENDIX C

Statutes Involved

Constitution of the United States:

ARTICLE I.

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

ARTICLE II.

Section 1. The executive Power shall be vested in a President of the United States of America * * *

Section 3. He * * * shall take Care that the Laws be faithfully executed * * *

ARTICLE IV.

Section 3. * * * The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *

Act of June 29, 1948 (62 Stat. 1075-1077):

Section 2 of the Act of June 29, 1948, by enacting Section 245, Title 2, Canal Zone Code, declares defendant to be an "agency and instrumentality of the United States."

Section 2, by enacting Section 245, also provides that:

> "Within the meaning of the laws of the United States relating to venue in civil actions, the corporation shall be deemed to be an inhabitant both of the southern judicial district of New York and of the Canal Zone."

Section 2, by enacting Section 247, declares defendant to be a corporation which "may sue and be sued in its corporate name."

Appendix C

(Statutes Involved)

Section 2 also enacted Section 253 as follows:

"253. PAYMENT OF EXCESS FUNDS INTO THE TREASURY. The board of directors shall have the power and duty to appraise, at least annually, its necessary working capital requirements, together with reasonable foreseeable requirements for authorized plant replacement and expansion, and to pay into the Treasury as dividends the amount of funds in excess thereof. Such dividends shall be treated by the Treasury as miscellaneous receipts, but shall be treated on the books of the corporation as applicable to reduction of past or future direct Government capital contributions (as provided in section 246(d) of this title) in determining the base for interest payments required under section 246(c)."

Act of September 26, 1950 (64 Stat. 1038-1043):

SEC. 2. (a) Except as otherwise provided in, or where inconsistent with, the provisions of this Act—

(1) the terms 'the Panama Canal,' 'the Canal,' and 'the Canal authorities,' wherever appearing in the statutes of the United States and having reference, prospectively, to the agency heretofore known by those names, are amended to read 'the Canal Zone Government'; and

(2) the term 'the Panama Railroad Company' wherever appearing in the statutes of the United States and having reference, prospectively, to the corporation heretofore known by that name, is amended to read 'the Panama Canal Company'.

* * * * * * *

SEC. 10. Article 3 of chapter 12 of title 2, Canal Zone Code, as added by the Act of June 29, 1948, is amended by renumbering sections 255 and 256 of said title 2 as sections 257 and 258, respectively, and by adding, in said article 3, two new sections numbered 255 and 256 and reading as follows: * * *

Appendix C

(Statutes Involved)

"256. AUTHORIZATION FOR TRANSFER OF PANAMA CANAL TO CORPORATION.—The President is hereby authorized to transfer to the corporation the Panama Canal, together with the facilities and appurtenances related thereto, and any or all of the facilities and appurtenances heretofore maintained and operated by the Panama Canal under authority of section 51 of title 2 of the Canal Zone Code, as amended by section 2 of the Act of August 12, 1949 (ch. 422, 63 Stat. 601), and all or so much as he may determine to be necessary of the personnel, property, records, related assets, contracts, obligations, and liabilities of or appertaining to the said Canal and the aforesaid facilities or appurtenances, and such transfer shall be deemed to have been accepted and assumed by the corporation without the necessity of any act or acts on the part of the corporation except as otherwise stipulated in the provisions of section 246 of this title."

SEC. 11. Section 411 of title 2 of the Canal Zone Code is amended to read as follows:

"411: AUTHORITY TO PRESCRIBE MEASUREMENT RULES AND TOLLS.—The Panama Canal Company is authorized to prescribe and from time to time change (1) the rules for the measurement of vessels for the Panama Canal, and (2), subject to the provisions of the section next following, the tolls that shall be levied for the use of the Panama Canal: *Provided, however,* That the rules of measurement, and the rates of tolls, prevailing on the effective date of this amended section shall continue in effect until changed as provided in this section: *Provided further,* That the said corporation shall give six months' notice, by publication in the Federal Register, of any and all proposed changes in basic rules of measurement and of any and all proposed changes in rates of tolls, during which period a public hearing shall be conducted: *And provided further,* That

changes in basic rules of measurement and changes in rates of tolls shall be subject to, and shall take effect upon, the approval of the President of the United States, whose action in such matter shall be final and conclusive."

SEC. 12. Section 412 of title 2 of the Canal Zone Code, as amended by the Act of August 24, 1937 (ch. 752, 50 Stat. 750), is amended to read as follows:

"412. BASES OF TOLLS.—(a) Tolls on merchant vessels, army and navy transports, colliers, tankers, hospital ships, supply ships, and yachts shall be based on net vessel-tons of one hundred cubic feet each of actual earning capacity determined in accordance with the rules for the measurement of vessels for the Panama Canal, and tolls on other floating craft shall be based on displacement tonnage. The rate of tolls on vessels in ballast without passengers or cargo may be less than the rate of tolls for vessels with passengers or cargo.

"(b) Tolls shall be prescribed at a rate or rates calculated to cover, as nearly as practicable, all costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto, including interest and depreciation, and an appropriate share of the net costs of operation of the agency known as the Canal Zone Government. In the determination of such appropriate share, substantial weight shall be given to the ratio of the estimated gross revenues from tolls to the estimated total gross revenues of the said corporation exclusive of the cost of commodities resold, and exclusive of revenues arising from transactions within the said corporation or from transactions with the Canal Zone Government.

"(c) Vessels operated by the United States, including warships, naval tenders, colliers, tankers, transports, hospital ships, and other vessels owned or chartered by the

United States for transporting troops or supplies, may in the discretion of the President of the United States be required to pay tolls. In the event, however, that such vessels are not required to pay tolls, the tolls thereon shall nevertheless be computed and the amounts thereof shall be treated as revenues of the Panama Canal Company for the purpose of prescribing the rates of tolls, and shall be offset against the obligations of the said corporation under paragraphs (c) and (e) of section 246 of this title, as amended.

"(d) The levy of tolls is subject to the provisions of section 1 of article III of the treaty between the United States of America and Great Britain concluded on November 18, 1901, of articles XVIII and XIX of the convention between the United States of America and the Republic of Panama concluded on November 18, 1903, and of article I of the treaty between the United States of America and the Republic of Columbia proclaimed on March 30, 1922.

"(e) Capital investment for interest purposes shall not include any interest during construction. * * *"

* * * * * * *

SEC. 14. Except for section 256 of title 2 of the Canal Zone Code, as added by section 10 of this Act, this Act shall take effect upon the effective date of the transfer to the corporation, pursuant to the provisions of said section 256, of the Panama Canal together with the facilities and appurtenances related thereto.

Administrative Procedure Act (5 U. S. C. §1001, 1009):

By Section 10(a) "any person suffering legal wrong" because of "agency action" is "entitled to judicial review."

By Section 2(g) "agency action" is defined to include "failure to act."

By Section 10(b) "the form of proceeding" may be "any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction * * *) in any court of competent jurisdiction."

By Section 10(e) the Court "shall (A) compel agency action unlawfully withheld or unreasonably delayed."

Title 28, United States Code (Judicial Code), §1331:

> §1331. *Federal question; amount in controversy.*
>
> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.

Treaty between the United States of America and Great Britain concluded on November 18, 1901 (Hay-Pauncefote Treaty), 33 Stat. 1903, Article III, Section 1:

> The United States adopts, as the basis of the neutralization of such ship canal, the following Rules, substantially as embodied in the Convention of Constantinople, signed the 28th October, 1888, for the free navigation of the Suez Canal, that is to say:
>
> 1. The canal shall be free and open to the vessels of commerce and war of all nations observing these Rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable.

Appendix C

(Statutes Involved)

Executive Order No. 10263 (16 F. R. 6333):

SECTION 1. There are hereby transferred to the Panama Railroad Company, a corporate agency and instrumentality of the United States which upon the effective date of this order shall, pursuant to the said act of September 26, 1950, be known as the Panama Canal Company, (a) the Panama Canal (the waterway), together with all the facilities, buildings, structures, and improvements related thereto, and (b) all other facilities, buildings, structures, and improvements whatsoever now maintained and operated by The Panama Canal, an independent agency of the United States, which upon the effective date of this order shall, pursuant to the said act of September 26, 1950, be known as the Canal Zone Government: *Provided, however,* that there are excepted from such transfer the following-described facilities, buildings, structures, and improvements, situated on the Isthmus of Panama, which shall be for use and administration by the agency which upon the effective date of this order shall, pursuant to the said act of September 26, 1950, be known as the Canal Zone Government: . . .

SEC. 8. This order shall become effective on July 1, 1951.

APPENDIX D

Prior Statutes Providing for the Prescription of Panama Canal Tolls

There follow the successive statutes relating to the prescription of Panama Canal tolls. This historical review demonstrates a pattern by which the President was designated to prescribe tolls, but commanded to do so in accordance with a defined policy, a policy which afforded some administrative discretion.

Act of August 24, 1912 (37 Stat. 560, 562-3).

SECTION 5. That the President is hereby authorized to prescribe and from time to time change the tolls that shall be levied by the Government of the United States for the use of the Panama Canal: *Provided*, That no tolls, when prescribed as above, shall be changed, unless six months' notice thereof shall have been given by the President by proclamation. No tolls shall be levied upon vessels engaged in the coastwise trade of the United States * * *

Tolls may be based upon gross or net registered tonnage, displacement tonnage, or otherwise, and may be based on one form of tonnage for warships and another for ships of commerce. The rate of tolls may be lower upon vessels in ballast than upon vessels carrying passengers or cargo. When based upon net registered tonnage for ships of commerce the tolls shall not exceed one dollar and twenty-five cents per net registered ton, nor be less, other than for vessels of the United States and its citizens, than the estimated proportionate cost of the actual maintenance and operation of the canal, subject, however, to the provisions of article nineteen of the convention between the United States and the Republic of Panama, entered into November eighteenth, nineteen hundred and three. If the tolls shall not be based upon net registered tonnage, they shall not exceed the equivalent of one dollar and twenty-five cents

per net registered ton as nearly as the same may be determined, nor be less than the equivalent of seventy-five cents per net registered ton. The toll for each passenger shall not be more than one dollar and fifty cents.

Act of June 15, 1914 (38 Stat. 385-6).

SECTION 1. That the second sentence in section five of the Act entitled "An Act to provide for the opening, maintenance, protection, and operation of the Panama Canal, and the sanitation and government of the Canal Zone," approved August twenty-fourth, nineteen hundred and twelve, which reads as follows: "No tolls shall be levied upon vessels engaged in the coastwise trade of the United States," be, and the same is hereby, repealed.

SECTION 2. That the third sentence of the third paragraph of said section of said Act be so amended as to read as follows: "When based upon net registered tonnage for ships of commerce the tolls shall not exceed $1.25 per net registered ton, nor be less than 75 cents per net registered ton, subject, however, to the provisions of article nineteen of the convention between the United States and the Republic of Panama, entered into November eighteenth, nineteen hundred and three."

Act of June 19, 1934, Adopting the Canal Zone Code (48 Stat. 1122).

Title 2:

SECTION 411. *Authority of President to prescribe and change tolls.*—The President is authorized, subject to the provisions of the section next following, to prescribe and from time to time change the tolls that shall be levied by the Government of the United States for the use of the Panama Canal, but no tolls when prescribed as above shall be

changed unless six months' notice thereof is given by the President by proclamation.

SECTION 412. *Bases of tolls; maximum and minimum rates.*—Tolls may be based upon gross or net registered tonnage, displacement tonnage, or otherwise, and may be based on one form of tonnage for warships and another for ships of commerce.

The rate of tolls may be lower upon vessels in ballast than upon vessels carrying passengers or cargo.

When based upon net registered tonnage for ships of commerce the tolls shall not exceed $1.25 per net registered ton, nor be less than 75 cents per net registered ton, subject, however, to the provisions of article 19 of the convention between the United States and the Republic of Panama, entered into November 18, 1903.

If the tolls are not based upon net registered tonnage, they shall not exceed the equivalent of $1.25 per net registered ton as nearly as the same may be determined, nor be less than the equivalent of 75 cents per net registered ton.

The toll for each passenger shall not be more than $1.50.

Act of August 24, 1937, Amending Section 412, Title 2, of the Canal Zone Code (50 Stat. 750).

SECTION 412. *Bases of tolls, measurement rules; maximum and minimum rates.*—Tolls on merchant vessels, army and navy transports, colliers, hospital ships, supply ships, and yachts shall be based on net vessel-tons of one hundred cubic feet each of actual earning capacity determined in accordance with the Rules for the Measurement of Vessels for the Panama Canal prescribed by the President and as may be modified by him from time to time by proclamation, and tolls on other floating craft shall be based on displacement tonnage: *Provided,* That the basic rules of measure-

ment shall not be changed except after public hearing and six months' public notice of such change. The rate of tolls on laden vessels shall not exceed $1, nor be less than $0.75 per net vessel-ton as determined under the aforesaid rules, and on vessels in ballast without passengers or cargo the rate may be less than the rate of tolls for vessels with passengers or cargo. In addition to the tolls based on measurement or displacement tonnage, tolls may be levied on passengers at rates not to exceed $1.50 for each passenger. The levy of tolls is subject to the provisions of article XIX of the convention between the United States of America and the Republic of Panama, entered into November 18, 1903, and of article I of the treaty between the United States of America and the Republic of Colombia proclaimed March 30, 1922.

APPENDIX E

The Report of the House Merchant Marine Committee on H. R. 8677, the Bill That Became the Act of September 26, 1950.

HOUSE OF REPRESENTATIVES

81st Congress) (Report
2d Session) (No. 2935

AUTHORIZING AND PROVIDING FOR THE MAINTENANCE AND OPERATION OF THE PANAMA CANAL BY THE PRESENT CORPORATE ADJUNCT OF THE PANAMA CANAL, AS RENAMED; TO RECONSTITUTE THE AGENCY CHARGED WITH THE CIVIL GOVERNMENT OF THE CANAL ZONE.

August 16, 1950.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed.

MR. O'TOOLE, from the Committee on Merchant Marine and Fisheries, submitted the following

REPORT

[To accompany H. R. 8677]

The bill is designed to implement recommendations of the Bureau of the Budget and of the President with respect to the organization and operation of the Panama Canal.

* * * * * * *

The recommendations contemplate (*a*) that in the organization of the Canal, transit and business functions should be separated from civil government functions; (*b*) that such transit and business functions should be operated on

a business basis by the Panama Railroad Company, renamed the "Panama Canal Company," and that civil government functions (including health and sanitation) should be performed by "the Canal Zone government"; (*c*) that tolls for commercial ships should be related to transit costs, including interest on Government investment in the Canal and a fair share of the net cost of health, sanitation, and civil government; (*d*) that free transits of Government ships should be eliminated; and (*e*) that the net appropriated cost of operation of the "Canal Zone government" should be reimbursed to the Treasury by the corporation, such reimbursement being proportionately charged to the various corporate divisions (e. g., railroad, steamship, commissary, etc.) on an equitable basis.

As reported by your committee the bill would be confined to the recommendations of the Bureau of the Budget and of the President. * * * The net cost of Canal Zone civil government would be borne from appropriations which would be reimbursed to the Treasury by the Company currently, or where necessary, over a longer period. The Company, in turn, would allocate the net cost of the Canal Zone Government against each of the corporate divisions. * * *

The bill as introduced would require that in the determination of the share of the net cost of health, sanitation, and civil government to be borne by tolls, substantial weight shall be given to the ratio of the estimated gross revenues from tolls to the estimated gross revenues of the corporation, exclusive of the cost of commodities resold and exclusive of revenues arising from transactions within the corporation or from transactions with the Canal Zone Government.

* * * * * *

Your committee is informed that the resulting allocation is expected currently to assess approximately an equal

division of the expense of health, sanitation, and civil government between the transit division and other corporate divisions. While the method of allocation contained in the bill is not the only possible method, it has the merit of simplicity and on the basis of information furnished the committee produces a reasonable and practical result.

It is generally agreed that in calculating the toll rate there should be excluded from the capital base all investment in equipment and structures, of business operations which are not directly related to operation of the Canal, all health, sanitation, and civil government facilities and equipment. Capital of each corporate division should also be reduced by a proportionate share of past net corporate repayments to the Treasury in excess of government investment pursuant to the provisions of Public Law 808 (80th Cong.). After these exclusions there would remain an item of $129,000,000 of interest which, accrued during construction of the Canal, and the amount was added to the Canal accounts by administrative determination in 1932 and represents a computation of the amount of interest compounded at 3 percent on funds appropriated between 1904 and 1920.

There is precedent for the exclusion of interest during construction from the capital investment of the Canal upon which interest is to be charged against toll revenues. Such interest during construction is not included in the capital accounts of the Tennessee Valley Authority and rates for power sold by the Authority are not computed to recover it.

Your committee has amended the bill to exclude interest during construction from the capital base for interest to be included in the tolls base. Such exclusion is recommended not only because of precedent but as a just and reasonable recognition of the defense value of the Canal, and as an offset against the operations which have been conducted and which, to some extent, will be conducted in the future, without reimbursement; for the Military Establishment or others in the interest of the United States. The amount

thus excluded approximates that which was found, pursuant to direction of a special Commission appointed by the Secretary of War in 1921, to represent the capital cost of the Canal allocable to defense. Your committee notes that, for the past 30 years, there has been much argument as to whether the Canal was constructed for defense or commercial needs. Your committee is of the opinion that exclusion of interest during construction from the corporation's toll base is a reasonable recognition of the Canal's defense value, and that such exclusion will obviate argument on this issue in the future.

Your Committee believes that legislation reorganizing the Panama Canal and establishing tolls policy has long been needed. Since it will require at least a year to effect the changes proposed by the bill it is recommended that this legislation be given early consideration.

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IN THE

Supreme Court of the United States

October Term, 1956

No. ~~1152~~ 252

GRACE LINE, INC., ET AL.,

Petitioners,

against

PANAMA CANAL COMPANY,

Respondent.

BRIEF BY JAMES M. ESTABROOK AS *AMICUS CURIAE* ON BEHALF OF AKTIESELSKABET DAMPSKIBSSELSKABET SVENDBORG, AKTIESELSKABET DAMPSKIBSSELSKABET "VESTERHAVET", AUSTRALIND STEAM SHIPPING CO., LTD., BLUE STAR LINE, LTD., COMPANIA COLOMBIA DE NAVEGACION MARITIMA, LTDA., COURT LINE, LTD., DAMPSKIBSSELSKABET AF 1912 AKTIESELSKAB, IVARANS REDERI A/S, MARINA MERCANTE NICARAGUENSE, S. A. NEW ZEALAND SHIPPING CO., LTD., PORT LINE, LTD., REDERIET "OCEAN" AKTIESELSKAB, WESTFAL-LARSEN & CO., A/S, AND WILH. WILHELMSEN IN SUPPORT OF PETITIONERS

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TABLE OF AUTHORITIES

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IN THE

Supreme Court of the United States

October Term, 1956

No.

GRACE LINE, INC., *et al.*,

Petitioners,

against

PANAMA CANAL COMPANY,

Respondent.

BRIEF AS *AMICUS CURIAE* IN FAVOR OF PETITIONERS GRACE LINE, INC., ET AL

The undersigned as counsel for representative foreign shipowners respectfully files with the consent of the parties pursuant to Rule 42, Paragraph 1 of the rules of this Court, this brief as *Amicus Curiae*.

Statement of Facts

In addition to the facts set forth in the brief of Petitioners *Grace Line, Inc., et al.*, I note that in recent years the use of the Panama Canal by foreign shipping has greatly increased. As observed by the Court of Appeals (fn. 9), quoting the General Accounting Office 1955 Audit Report (p. 2) commercial tolls collected have increased as follows:

Tolls Revenue	*Foreign Flag*	*U. S. Flag*
1955	$23,442,170	$10,407,307
1952	16,935,823	9,986,708

Since Canals, like toll highways, operate with rather rigid costs, increase in volume may be expected to result in lower tolls. That has happened, for instance, at Suez.

Following the post-World War II activity in trade, tolls on the Suez Canal were reduced during private operation about 40% after 1946. In turn the increase in volume at Suez has been greater than that at Panama—partly at least due to traffic generated by the decreased rate.

POINT I

Charging non-Canal losses against Canal operation for tolls-fixing purposes deprives the Canal users of the lower toll which would otherwise result and is contrary to the progressive public policy of trade, not aid.

The opinion of the Court of Appeals and the briefs of the petitioners have demonstrated beyond doubt that Section 412(b), Title 2, of the Canal Zone Code, as shown both by language and legislative history do not contemplate that Canal operation be burdened, or affected, by non-Canal activities. Yet the Panama Canal Company, as shown by the Audit Reports of the General Accounting Office, has deprived Canal users of the benefits which the Canal users would otherwise receive by loading on Canal operations the losses of these other activities.

The result is unfair to Canal users and unlawful under the laws of the United States. It is moreover a most unfortunate precedent to set for other nations, many of which are under far greater pressures than the United States to exploit for purposes of national policy assets properly dedicated, like the Panama Canal, to the welfare of the world community.

POINT II

The United States treaty obligations in the Hay-Pauncefote Treaty require that damages for the Panama Company's disregard of law and consequent collection of excessive tolls should be awarded Canal users, certainly as that treaty was implemented by the Act of September 26, 1950.

The Hay-Pauncefote Treaty, expressly modeled on the Constantinople Convention of 1888, calls for "just and equitable charges." Clearly this means that if unjust and inequitable charges are collected, the excess should be refunded.

Even more clearly Courts here are traditionally the arbiters of what is "just and equitable". To relinquish this function to the executive would be an unfortunate international example.

By the Act of September 26, 1950 Congress explicitly defined "just and equitable". That definition was in no way remarkable; it provided for a toll sufficient to pay costs of operations and a return on investment measured by historical cost.

That Act also transferred the Canal to a corporation fully subject to suit and incorporated the "just and equitable charges" provision of the Hay-Pauncefote Treaty in the laws of the United States (Section 12, Amending Section 412(a), Title 2, Canal Zone Code).

It is well-settled in Anglo-American jurisprudence that the user of a public utility who is charged an excessive rate is entitled to reparation in the amount of the excess. *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 436.

Accordingly the duty of restitution which would formerly have been a matter of international negotiation is

now judicially enforceable in the courts of the United States.

To deny relief for past over-charges on the ground that there was no way of telling how the President would have exercised his Section 411 review power imputes to the President an extra legal function not called for by this legislation. To construe the Act of 1950 as authorizing the President to abrogate rather than enforce its policy is inconsistent with the basic concepts of the language of the statute, the legislative history and the Constitution.

There is no provision for discrimination in toll rates between ships of different nationalities. The President is given no power to retaliate, as far as Panama Canal tolls are concerned, against any foreign action. Such activity is reserved to other spheres. Consequently, policies involving air line routes and tariffs do not apply.

CONCLUSION

This Court should grant the petition of Grace Line Inc., *et al.*

Respectfully submitted,

JAMES M. ESTABROOK,

Amicus Curiae and Counsel for Aktieselskabet Dampskibsselskabet Svendborg, Aktieselskabet Dampskibsselskabet "Vesterhavet", Australind Steam Shipping Co., Ltd., Blue Star Line, Ltd., Compania Colombia de Navegacion Maritima Ltda., Court Line, Ltd., Dampskibsselskabet AF 1912 Aktieselskab, Ivarans Rederi A/S, Marina Mercante Nicaraguense, S. A., New Zealand Shipping Co., Ltd., Port Line, Ltd., Rederiet "Ocean" Aktieselskab, Westfal-Larsen & Co., A/S, and Wilh. Wilhelmsen in Support of Petitioners.

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No. 252

In the Supreme Court of the United States

OCTOBER TERM, 1957

GRACE LINE, ET AL., PETITIONERS

v.

PANAMA CANAL COMPANY

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE PANAMA CANAL COMPANY

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 252

GRACE LINE, ET AL., PETITIONERS

v.

PANAMA CANAL COMPANY

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE PANAMA CANAL COMPANY

This cross-petition for a writ of certiorari seeks review of a portion of the same judgment with respect to which the Panama Canal Company, respondent here, has filed its own petition for a writ of certiorari (October Term, 1957, No. 251). In No. 251, the Canal Company takes the position that the Court of Appeals erred in directing it to lower its tolls prospectively. Here, cross-petitioners contend that the Court of Appeals erred in failing to award damages compensating them for the allegedly excessive tolls paid by them in the past—because the Company did not lower the tolls in the past.

We submit that the decision below is correct to the extent that it rejects cross-petitioners' claim for

damages (cf. Pet. App. 23). However, for the reasons stated in No. 251, we believe that the major part of the decision below requires review by this Court, and it may be helpful for the Court to have the entire controversy before it so that it can make any disposition thereof which may be just. For that reason we do not oppose the granting of this cross-petition for a writ of certiorari, in the event that the petition in No. 251 is granted.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

JUNE 1957.